85-314

No. .....

Supreme Court, U.S.
FILED
AUG 22 1985
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1984

FLOYD JAMES, WARDEN,

Petitioner,

v.

SHIRLEY TYLER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

I.

Whether, in the context of the sentencing phase of a death penalty case, the Eleventh Circuit Court of Appeals has misapplied the standard enunciated by this Court in *Strickland v. Washington*, — U.S. —, 104 S.Ct. 2052 (1984) so as to create a per se finding of ineffective assistance for failure to present arguably mitigating evidence, and so as to totally eliminate the prejudice prong of the two part test for judging the effectiveness of counsel?

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FLOYD JAMES, WARDEN,

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SHIRLEY TYLER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Floyd James, respectfully prays that the writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered on February 22, 1985.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit is reported in *Tyler v. Kemp,* 755 F.2d 741 (11th Cir. 1985) (Appendix A). The decision

of the United States Court of Appeals for the Eleventh Circuit denying Petitioner's petition for rehearing and suggestion for rehearing *en banc* was entered on June 4, 1985 (Appendix B). The opinion of the district court granting federal habeas corpus relief to Respondent is unreported, however, a copy of the same is reproduced in Petitioner's Appendix C. For further use in evaluating the merits of this application for a writ of certiorari, reproduced herein is the Magistrate's Report and Recommendation at Appendix D.

JURISDICTIONAL STATEMENT

The opinion of the panel of the United States Court of Appeals for the Eleventh Circuit was entered on February 22, 1985 in *Tyler v. Kemp,* 755 F.2d 741 (11th Cir. 1985). (Appendix A). A petition for rehearing and suggestion for rehearing *en banc* was denied on June 4, 1985. (Appendix B).

This petition for a writ of certiorari has been timely filed within the allowable ninety days. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The United States Constitution, Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an

> impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The United States Constitution, Fourteenth Amendment, Sec. I:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

STATEMENT OF THE CASE

(i) Course of Proceedings.

Respondent was convicted of murder on December 4, 1979 in the Superior Court of Pike County upon Indictment No. K-159. A sentence of death was imposed on that same date. Respondent's conviction and sentence were affirmed on direct appeal at *Tyler v. State*, 247 Ga. 119, 274 S.E.2d 549, *cert. denied*, 454 U.S. 882, 102 S.Ct. 364 (1981).

Following the exhaustion of all avenues for relief on direct appeal, the Superior Court of Pike County reset Respondent's date of execution for January 11, 1982, by Order dated December 30, 1981.

On January 8, 1982 Respondent petitioned the Superior Court of Baldwin County for a stay of her execution. After conducting an evidentiary hearing on Respondent's request for a stay of execution, the Superior Court of Baldwin County rendered its Order of January 9, 1982 denying the request. By Order dated January 10, 1982 the Supreme Court of Georgia affirmed the state habeas corpus court's denial of Respondent's request for a stay of execution.

On January 10, 1982 Respondent filed a petition for a writ of habeas corpus in the federal district court and simultaneously petitioned for the issuance of an Order staying her then scheduled January 11, 1982 execution. By Order dated January 10, 1982, the district court stayed Respondent's execution.

On September 21, 1982 Respondent was afforded a federal habeas corpus evidentiary hearing, at which hearing Respondent was present and represented by counsel. At the conclusion of the aforementioned hearing the district court afforded counsel for the parties an opportunity to submit post-hearing briefs on a staggered briefing schedule.

On November 8, 1982, after the evidence was closed, Respondent sought to reopen the evidence via a "Motion to Supplement Record," which motion was opposed by Petitioner. After considering the written arguments of the

parties on this issue, and after conducting a telephonic conference with counsel for the parties, the district court afforded Respondent an opportunity to reopen the evidence. Accordingly, another evidentiary hearing was had on November 30, 1982.

On June 8, 1983 the Magistrate issued his Report and Recommendation, recommending that habeas corpus relief be denied. Notwithstanding the Report and Recommendation of the Magistrate, on February 15, 1984 the district court granted the Respondent habeas corpus relief as to the sentence of death. A timely notice of appeal was filed by the Petitioner, and the Respondent cross-appealed.

On February 22, 1985 a panel of the Eleventh Circuit Court of Appeals affirmed the district court's grant of habeas corpus relief. A petition for rehearing and suggestion for rehearing *en banc* was denied on June 4, 1985. This timely petition for a writ of certiorari on behalf of the warden, Floyd James follows.

(ii) Statement of Facts.

On October 22, 1979 Respondent murdered her husband, James Tyler, by placing poison in his food at their home in Zebulon, Georgia. On two prior occasions during the months preceding the victim's death, Respondent placed small amounts of poison in James' food, causing him traumatic illness.

At approximately 9:00 p.m. on September 18, 1979 William Tyler, the victim's father, was summoned to James' house. (T. 77, 78).[1] James' parents lived next

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[1]T. refers to the pages of Respondent's trial transcript.

door to James and Respondent. (T. 76). Mr. Tyler found his son limp and wet with sweat, lying on his stomach on the bedroom floor. (T. 78, 81). James was suffering from severe abdominal pains, nausea and uncontrolled bowels. (T. 79, 80, 106). The victim cried that he was burning up and begged for water. (T. 79-81). The victim was transported to Upson County Hospital in Thomaston, Georgia. James stayed in the hospital three days while being treated for what was thought to be viral gastroenterites. (T. 83, 107, 124, 125).

On October 3, 1979 at approximately 8:00 p.m., Mr. Tyler was again called to James' house. (T. 84). Mr. Tyler found his son weak and sweating profusely, lying on the living room floor experiencing abdominal pain, nausea and diarrhea. (T. 85, 86). Dr. David Fieseler, James' attending physician at the hospital, testified that James exhibited convulsive seizures and high blood pressure. (T. 126, 127). On the following day the victim's condition subsided, but only temporarily. (T. 128, 129).

After approximately four days in Upson County Hospital, James was transported to the medical center in Columbus, Georgia for treatment and tests to either confirm or deny the existence of a cerebral hemorrhage. (T. 88, 112, 133). Test results did not show the existence of a cerebral hemorrhage. (T. 135, 136). On October 19, 1979, a week after his release from the medical center, James was again examined by Dr. Fieseler. (T. 137). Dr. Fieseler testified that James was progressing well, with few symptoms remaining. (T. 137).

On the evening of October 22, 1979 James became ill again. (T. 90, 94). Witnesses testified that James ex-

perienced the same symptoms and sickness as on the two previous occasions. (T. 94, 96). James was foaming at the mouth, garbling and unable to talk. (T. 95). James died enroute to the hospital, and was pronounced dead on arrival. (T. 97, 98, 138, 139).

Dr. Fieseler testified that James' condition suggested a cerebral hemorrhage; however, due to the unaccountable manner in which James died, Dr. Fieseler requested an autopsy. (T. 138-140). Dr. Fieseler and pathologist Dr. Robert L. Shacklett testified that the cause of death was a lethal ingestion of parathion, a chemical poison. (T. 142, 166, 167). Discussions with the Tyler family revealed that a poison labeled phoskil had been spread around the Tyler home to kill roaches. (T. 100, 142, 143). Phoskil contained the active ingredient parathion. (T. 143, 146). Dr. Shacklett testified that it was possible that the poison could be ingested through the skin, although such an ingestion was unlikely. (T. 168).

GBI Agent Dan Greene was called to investigate what appeared to be a possible homicide. (T. 170, 172). Greene went to the victim's home where Respondent pointed out the phoskil powder which was spread around the baseboards throughout the house, under the kitchen sink and in a cabinet drawer next to the stove. (T. 172, 177). Respondent told Greene that James might have rolled in the powder on the floor. (T. 176). Respondent stated that James had eaten dinner at the house prior to each instance that he became ill. (T. 174). Phoskil samples taken from the cabinet drawer and under the kitchen sink were taken to the State Crime Lab for analysis.

Bill Wall, Forensic Toxicologist at the State Crime Lab, examined the samples of phoskil and specimens from the victim's body. (T. 222, 230). Wall concluded that the victim's liver and brain contained lethal amounts of parathion as contained in the phoskil samples from the Tyler residence. (T. 166, 227-230).

From the investigation evolved suspicion that indicated that Respondent was involved in James' death. (T. 181). Greene spoke with Respondent on November 2nd concerning a polygraph test. (T. 213-215). On November 6th, Respondent contacted Greene. (T. 188-214, 215). During this period Respondent made three statements to Greene and to police. (T. 183-184, 203-210). Following a *Jackson v. Denno* hearing, the trial court ruled that all statements made by Respondent were admissible into evidence. (T. 181, 199).

On November 2nd Respondent, in addition to describing what foods James had eaten, stated that James had become ill after dinner. (T. 185, 186, 203, 204). Respondent denied giving James poison and stated that James had rolled in the powder. (T. 203).

On November 6th Respondent gave oral and written statements to police. (T. 192, 207, 209). Respondent stated that she scraped poison from the cabinet drawer and put the poison in the chili her husband had eaten on the night of his death. (T. 190, 194, 207-210). Respondent declined to discuss the first two instances of James' illness. (T. 207). Respondent stated that she was afraid James was going to hurt her son. (T. 210). Greene spoke

with Tony. (T. 219). Tony stated that he had not been spanked by his father in the past three years. (T. 219).

Greene telephoned the victim's former employer concerning a $15,000.00 life insurance policy. (T. 218). Greene was informed that Respondent had also recently inquired about the policy. (T. 218). Contrary to the information that had been acquired by Greene during his investigation, Respondent had earlier told Greene that the victim carried only a $500.00 life insurance policy. (T. 218, 221). Respondent also initially denied having a sexual relationship with another man named Daniel Evans; however, Respondent later recanted and admitted having a sexual relationship with Evans during her marriage to the victim. (T. 220, 255-260).

In her testimony during trial Respondent gave a third conflicting account of how James died. Respondent testified that on October 22nd James committed suicide by putting the poison in his chili and orange juice. (T. 253, 269). Respondent testified that James begged her to give him the poison, but that she refused. (T. 248). After words were passed between the two, Respondent testified that after she refused to give the victim the poison, James scraped poison with a spoon from the cabinet drawer, put the poison in his own food and then placed the spoon on the kitchen counter. (T. 248). Respondent denied killing James or putting poison in his food. (T. 252, 253).

Respondent also testified that James rolled around in the poison on the first instance of his illness. (T. 258). Respondent further testified that following her husband's death she contacted his employer in an effort to obtain

information regarding James' social security, but not about James' life insurance policy. (T. 241, 242).

Dr. Fieseler testified that while under his care James was not suicidal and in fact, was in a good, normal mental state. (T. 137, 138). The jury found Respondent guilty of murder and recommended imposition of a sentence of death.

Further facts will be developed as needed for a more thorough illumination of any issue presented here on this petition.

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REASONS FOR GRANTING THE WRIT

I. In The Context Of The Sentencing Phase Of A Death Penalty Case, The Eleventh Circuit Court Of Appeals Has Misapplied The Standards Enunciated By This Court In Strickland v. Washington, — U.S. —, 104 S.Ct. 2052 (1984), So As To Create A Per Se Finding Of Ineffective Assistance For Failure To Present Arguably Mitigating Evidence, And So As To Eliminate The Prejudice Prong Of The Two Part Test For Judging The Effectiveness Of Counsel.

In *Strickland v. Washington,* — U.S. —, 104 S.Ct. 2052 (1984), this Court opined that claims of ineffective assistance of counsel would be measured by the test of whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result. 104 S.Ct. at 2064. In order to make this determination a reviewing

court must utilize a two prong test. First, did counsel in fact render a deficient performance. "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 2064. Second, the defendant must show that the deficient performance prejudiced the defense. "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 2064.

In the instant case the circuit court correctly ascertained that Mr. Bishoff (Respondent's trial counsel) was aware of the distinctions between the two phases of a bifurcated capital trial in Georgia, that prior to trial Mr. Bishoff interviewed members of Respondent's family regarding her background, investigated the potential jurors, drew on the expertise of other more experienced counsel in preparing for trial and sought character witnesses from the community, which potential witnesses included a minister. Having conducted a more than reasonable investigation in preparation for the sentencing phase of trial, i.e., the search for character witnesses and an investigation of Respondent's background, Mr. Bishoff testified at the federal evidentiary hearing that he made a strategic decision not to call the character witnesses to the stand on the penalty phase of trial because:

> I knew we had the right to do that. Again, I could not arrive with anyone I was willing to trust, I could put up for that purpose. It seemed like everybody in that area apparently turned against Shirley, and as I recall, I couldn't come up with anyone for that purpose.

(9-21-82 Hearing Tx., Vol. 1 at 47).

While the circuit court relies heavily upon its conclusion that Respondent's family did not understand the distinctions between the guilt/innocence and penalty phase of trial and thus the purpose for which their testimony could be offered, the fact remains that Mr. Bishoff understood these distinctions and was in the proper position to evaluate the usefulness of these potential witnesses' testimony.[2]

After considering the nature of the lukewarm character testimony available to him, the demeanor of his potential witnesses and the likely impact of cross-examination, Mr. Bishoff made a strategic decision not to use the subject witnesses, nor to put the Respondent back on the witness stand because she too was unpredictable and unresponsive to questions posed. (9-21-82 Hearing Tx., Vol. 1, T. 51-53, 42).

In *Strickland, supra,* at 2065, this Court opined that "[j]udicial scrutiny of counsel's performance must be highly deferential." Further, this Court noted that with reference to accessing attorney performance, "[b]ecause of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct

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[2]While the circuit court opines that Respondent possessed "a good work record" there exists absolutely no testimony from any former employer regarding Respondent's work record as Respondent has never produced the same, nor demonstrated that the same exists. Further, at the federal evidentiary hearing, the alleged mitigation testimony from the various family members was revealed, on cross-examination, to be total hearsay and immaterial as their descriptions of the relationship between the Respondent and the victim were based upon what Respondent had told them, and not upon their personal observations in as much as Respondent had lived away from her family members for more than twelve years.

falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Strickland, supra* at 2065-2066. In expounding further on the presumption of attorney competency, this Court noted that a reviewing court " . . . should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 2066.

In the instant case the circuit court has totally disregarded the strong presumption of attorney competency identified by this Court in *Strickland v. Washington, supra.* Notwithstanding the fact that all of the evidence contained in the record reveals that Mr. Bishoff made a sound trial strategy decision based upon the lukewarm nature of the character testimony available, in light of the possible damage that might be done on cross-examination, and ultimately decided not to tender the same on the sentencing phase of trial, the circuit court has opined that where arguably mitigating character testimony is available, it is per se ineffective assistance of counsel to fail to offer the same in evidence. Special note must be taken of the fact that the Magistrate, the only judicial official who observed the demeanor and lack of candor of Respondent's mitigation character witnesses, concluded that these witnesses " . . . wholly failed to bring forth any character evidence that would have been likely to make a difference at trial." (Appendix D at 12).

In this case the circuit court and the district court, unlike the Magistrate who was in a position to observe the

demeanor and lack of candor of Respondent's family member witnesses and who did not credit the same, have substituted their judgment, based on a cold record, for the sound trial strategy decisions made by counsel at the time of trial. It is exactly this type of appellate conduct that this Court advised against in *Strickland v. Washington, supra*. Utilizing the proper standard identified by this Court, under the facts of this case, contrary to the conclusion reached by the circuit court, it cannot be said that " . . . in light of all the circumstances, the identified acts or omissions were outside the wide range of professional competent assistance." *Strickland, supra* at 2066. Accordingly, the circuit court erred in concluding that counsel's representation was ineffective.

Notwithstanding the fact that the circuit court failed to use the proper standard in judging the reasonableness of counsel's challenged conduct on the facts of this particular case, assuming *arguendo* that counsel's representation was ineffective, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland, supra* at 2067. As noted by this Court, prior to the awarding of relief in habeas corpus, a deficiency ". . . in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution." *Strickland, supra* at 2067. Conflict of interest claims aside, actual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that a defendant affirmatively prove prejudice. In this regard, a

reviewing court making the prejudice inquiry must ask, taking the unaffected factual findings as a given, and taking due account of the effects of the errors on the remaining findings, if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors. *Id.* at 2069.

In this regard, Petitioner notes that most of that evidence identified by the circuit court as being "mitigating" was presented to the jury through the testimony of the Respondent and her son on the guilt/innocence phase of trial, including the lack of any evidence of a prior criminal record. Because under Georgia law the sentencer is instructed to consider all evidence introduced in both phases of trial in arriving at the appropriate punishment to be imposed, an inquiry under the prejudice prong of the *Strickland v. Washington* analysis must be resolved in favor of this Petitioner. Because this jury was presented with and instructed to consider most of that evidence identified by the circuit court as being "mitigating" in arriving at the appropriate punishment to be imposed, the subject evidence having been submitted on the guilt/innocence phase of trial, it cannot reasonably be said that the sentencer's decision on punishment would likely have been different absent the resubmission of this same evidence on the penalty phase of trial.

In the instant case the circuit court has misapplied this Court's decision in *Strickland v. Washington*, so as to create a per se rule requiring a finding of ineffective assistance of counsel on the sentencing phase of a capital case where counsel fails to present arguably mitigating evidence, notwithstanding the character of such evidence, or the fact that the failure to submit the same works no

prejudicial impact on the defense, i.e., there exists no reasonable likelihood that the decision on sentencing would have been different absent the alleged errors.

The Eleventh Circuit Court of Appeals has totally disregarded the standard enunciated by this Court in *Washington v. Strickland*. In the context of the sentencing phase of a death penalty case the circuit court has opined that where arguably mitigating evidence exists it is per se ineffective assistance not to present the same notwithstanding the exercise of legitimate trial strategy or the lack of substantive nature of the evidence. The application of this new standard creates a question of exceptional importance which requires the granting of certiorari by this Court.

CONCLUSION

For all of the above and foregoing reasons, Petitioner prays that this Court grant a writ of certiorari in order to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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APPENDIX A

Shirley TYLER,
Petitioner-Appellee, Cross-Appellant,

v.

Ralph KEMP, Warden,
Respondent-Appellant, Cross-Appellee.

No. 84-8213.

United States Court of Appeals, Eleventh Circuit.
Feb. 22, 1985.

Petitioner sought habeas corpus relief from conviction and sentence for murder of her husband as affirmed, 247 Ga. 119, 274 S.E.2d 549. The United States District Court for the Northern District of Georgia, Horace T. Ward, J., granted the writ as it pertained to the death sentence, and the state appealed. The Court of Appeals held that: (1) petitioner was denied effective assistance of counsel during sentencing phase in that defense counsel presented no evidence of mitigating circumstances; (2) jury charge on mitigating evidence did not affect outcome of trial, and thus was not reversible error; and (3) denial of psychiatric examination to develop mitigating evidence regarding petitioner's mental state was not error.

Affirmed.

William B. Hill, Jr., Asst. Atty. Gen., Atlanta, Ga., for respondent-appellant, cross-appellee.

Glenn Zell, Atlanta, Ga., for petitioner-appellee, cross-appellant.

Appeals from the United States District Court for the Northern District of Georgia.

Before GODBOLD, Chief Judge, CLARK, Circuit Judge, and THOMAS*, District Judge.

PER CURIAM:

Petitioner, Shirley Tyler, state prisoner currently incarcerated at the Middle Georgia Correctional Institute in Hardwick, Georgia, was convicted and sentenced to death for the murder of her hsuband, James Tyler. After exhausting her state remedies she filed a federal petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 raising ten grounds for relief. The matter was initially referred by the district court to a magistrate. The magistrate recommended that the writ be denied. The district court, however, found that the petitioner had been denied effective assistance of counsel during the penalty phase of the trial. Additionally, the district court found that an instruction given by the state trial court was defective in its explanation of mitigating circumstances. Therefore, the district court granted the writ of habeas corpus as it pertained to the death sentence and the state brings this appeal. We affirm.

The Death of James Tyler and Petitioner's State Trial

James Tyler died on October 22, 1979 en route to the hospital. The doctor was unable to ascertain the cause of death and an autopsy was conducted. The pathologist concluded that Mr. Tyler died as a result of poisoning, af-

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* Honorable Daniel H. Thomas, U.S. District Judge for the Southern District of Alabama, sitting by designation.

ter finding a lethal amount of parathion in his body. A subsequent investigation revealed a poison called phoskil (containing parathion) had been spread around the Tyler home to kill roaches. After discussions with Ms. Tyler, investigators began to suspect that she had poisoned her husband. She subsequently gave a statement in which she admitted that on the night of his death she had scraped some of the powder from a drawer and put it her husband's chili because she was afraid he would hurt her son.[1] She was subsequently indicted for murder. At trial, Ms. Tyler was represented primarily by appointed counsel, Richard A. Bishoff.[2] Mr. Bishoff had only been admitted to the bar several months before his appointment as petitioner's counsel in November of 1979.[3] He had never participated in a murder case and his sole criminal experience consisted of trying a robbery case and an aggravated assault case, each of which took less than half a day. Mr. Bishoff filed several pretrial motions including a motion to suppress Ms. Tyler's statement, a motion for a change of venue due to pretrial publicity, and a motion for a psychiatric examination. All of these were denied by the trial

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1. Mr. Tyler had been hospitalized on two previous occasions for severe abdominal pain, nausea, uncontrolled bowels, and extreme thirst. Because the cause of these previous illnesses was never determined by a physician, the state's theory at trial was that the two previous illnesses were induced by Mrs. Tyler's poisoning of her husband as well.

2. Ms. Tyler was actually represented by two court appointed attorneys, Bishoff and Eric D. Hearn, Mr. Bishoff's law partner. Mr. Hearn assisted in trial preparation, Mr. Bishoff actually tried the case.

3. Mr. Bishoff had graduated from the University of Georgia Law School in March of 1979, taken the bar in February of 1979 and been admitted to the bar in June of 1979.

judge. At trial, Bishoff presented two witnesses for the defense: Shirley Tyler and her oldest son Tony, who was then thirteen. Ms. Tyler testified at trial that her husband had been depressed and that he committed suicide after she had refused to give him poison. The state offered two explanations of Ms. Tyler's motive for killing her husband. One theory was that she killed him in order to receive life insurance benefits. The second theory was that she was having an extramarital affair.[4] The jury convicted Ms. Tyler of first-degree murder. No evidence was introduced by either party at the sentencing phase of the trial. The jury imposed the death penalty and more specifically found the presence of the aggravating circumstance that Mr. Tyler's death was "inhuman in that it involved torture." O.C.G.A. § 17-10-30(7).

On direct appeal to the Georgia Supreme Court, petitioner's conviction and sentence were affirmed. *Tyler v. State*, 247 Ga. 119, 274, S.E.2d 549 (1981). The Supreme Court denied Ms. Tyler's petition for a writ of certiorari. *Tyler v. Georgia*, 454 U.S. 882, 102 S.Ct. 364, 70 L.Ed.2d 191 (1981). Petitioner exhausted the state collateral remedies and filed the instant petition in January of 1982. Two

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4. The district court found that there was little substantial evidence to support either of these theories. As to the insurance benefits claim, there was some evidence she inquired as to Mr. Tyler's insurance *after* his death. The jury, however, did not find that Ms. Tyler killed James Tyler for pecuniary gain even though the state urged them to do so at the penalty phase. *See* O.C.G.A. § 17-10-30(4) (aggravating circumstance; murder for the purpose of receiving money). The evidence regarding the extramarital affair centered upon a certain man Ms. Tyler had seen during a period of separation from her husband and who she was seen with after her husband's funeral.

evidentiary hearings were held, one in September of 1982 and the second hearing in November of 1982. The magistrate issued his report and recommendation finding no merit in any of petitioner's claims. Petitioner objected to the report and the district court subsequently granted habeas corpus relief as to the sentence of death.

There are five issues on appeal in this case; three of which are appealed by the state and two of which are raised on cross-appeal by Ms. Tyler. The state raises the following issues: (1) whether the district court erred in finding that Ms .Tyler was denied effective assistance of counsel in the sentencing phase of the trial because counsel presented no evidence in mitigation; (2) whether the trial court's charge on mitigating circumstances was constitutionally defective; and (3) whether certain comments made by the district attorney during closing argument were so prejudicial as to render the trial fundamentally unfair. The issues on cross-appeal are: (1) whether the death sentence is cruel and unusual punishment for a case involving a domestic homicide; and (2) whether Ms. Tyler was denied due process and equal protection of the law when the court denied her motion for a psychiatric examination both prior to trial and prior to the sentencing hearing. We approach these issues in turn.

Ineffective Assistance of Counsel

The district court found that Bishoff rendered ineffective assistance of counsel at the sentencing phase, principally because he presented no evidence of mitigating circumstances. Resolution of this issue requires application of the facts to the legal principles enunciated by the Supreme Court in the recent decision of *Strickland v. Wash-*

ington, — U.S. —, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In *Strickland,* the Court held that ineffective assistance of counsel would be measured by the test of whether counsel's conduct so undermined the proper functioning of the adversary process that the trial cannot be relied upon as having produced a just result. 104 S.Ct. at 2064. In order to make this determination, the Court delineated a two-part inquiry. First, did counsel in fact render a deficient performance? And second, if counsel's performance was deficient, was this prejudicial to the defense in any particular way?

[1] In order to make the first determination, the Court said that the test must be whether counsel's conduct fell below an objective standard of reasonableness. 104 S.Ct. at 2065. In other words, someone challenging the assistance of counsel must show that the particular acts of counsel were outside the "wide range of competent assistance." The Court also expressed a presumption in favor of competence that one challenging the effectiveness of counsel must overcome. 104 S.Ct. at 2066.

In order to make the second determination, it must be shown that the acts of counsel that were outside the range of competence were actually prejudicial, *i.e.*, that they had an adverse effect. 104 S.Ct. at 2067. In order to show actual prejudice, it must be shown that there was a "reasonable probability that but for counsel's unprofessional errors the result of the proceeding would have been different." 104 S.Ct. at 2068.

[2] Applying these principles, we conclude that the district court did not err in holding that Bishoff was ineffective for failure to present mitigating evidence at the

sentencing phase, and we conclude also that the omission was actually prejudicial.

During his investigation Bishoff (possibly accompanied by Hearn) met with members of Ms. Tyler's family at the jail for a couple of hours and discussed the case and defendant's background. Before trial Bishoff talked by phone with Shirley Tyler's grandmother and asked for the names of people who could testify. Immediately before trial, at the courthouse, Bishoff talked with the grandmother, aunt and brother. All stated, either at the jail or at the courthouse, or on both occasions, that they would not testify, or that they did not want to be involved. Their explanation, given at that time or at the habeas hearing, or both, was that they knew nothing of the murder and had nothing to tell.

The aunt and the grandmother testified that Bishoff did not tell them that their testimony was needed on any subject other than guilt or innocence and did not explain the sentencing phase of the trial or that evidence of a mitigating nature was needed. They testified that they would have been willing to appear as mitigating evidence witnesses had they understood that such testimony was useful and needed, and they described various mitigating facts they could have covered in testimony. Bishoff's own testimony reveals that at no time did he discuss with the family members the need for their testimony in mitigation. Rather, so far as the family members knew from him, once they declined to testify because they knew nothing about the killing, the matter of their testifying ended. There was mitigating evidence that could have been submitted: that Shirley Tyler had no prior criminal record, not even an arrest; that she had a good work record and

used her earnings to help care for her family; that her husband was drunk and abusive at times and had knocked out some of her teeth when drunk; that she and her children moved away at one time because he drank and beat her; that on one occasion he put her out of the house in her night clothes; that she was a good mother, "crazy about her children," and kept them clean and cared for; that her character and reputation as wife and mother were good.

Mitigating evidence from outside the family was possibly available. Despite testimony that Ms. Tyler had a good work record, no effort was made to bring forward testimony from her last employer. The absence of a prior criminal record was not adduced by evidence or stipulation.

Mitigating evidence was especially important because of the attitude in the small rural county where the murder occurred. Ms. Tyler's family lived outside the county. She had married and moved there. Her husband's family lived in the county. Both families were blacks, and the black community was outraged over the killing. Bishoff sought testimony from persons within the county but had difficulty finding anyone who would even talk to him about the case. He sought the testimony of a black minister, whose testimony he thought would be more helpful than that of anyone else, but to no avail. In these circumstances the testimony of family members, of defendant's former employer, and of her lack of a criminal record was especially important. These appeared to be the sole available sources for mitigating evidence, and they were not utilized.

As the Supreme Court has noted in its capital decisions, one of the key aspects of the penalty trial is that the sentence be individualized, i.e., the jury's discretion should

be focused on the particularized nature of the crime and the characteristics of the individual defendant. *Gregg v. Georgia,* 428 U.S. 153, 206, 96 S.Ct. 2909, 2940, 49 L.Ed.2d 859 (1876). In *Lockett v. Ohio,* 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) the court held that a defendant has the right to introduce virtually any evidence in mitigation at the penalty phase. The evolution of the nature of the penalty phase of a capital trial indicates the importance of the jury receiving adequate and accurate information regarding the defendant. Without that information, a jury cannot make the life/death decision in a rational and individualized manner. Here the jury was given no information to aid them in the penalty phase. The death penalty that resulted in this case was thus robbed of the reliability essential to assure confidence in that decision.

In a recent decision, *King v. Strickland,* 748 F.2d 1462 (11th Cir.1984), a panel of our circuit reached the same conclusion as we do on similar facts. In *King,* counsel, who had never tried a capital case, failed to present available character testimony in mitigation at the penalty phase. The panel concluded that this, in conjunction with his weak closing argument at the penalty phase, denied the petitioner effective assistance of counsel. As the court in *King* stated, "[t]here is a sufficient probability that effective counsel could have convinced a sentencer that the death sentence should not be given to undermine confidence in the outcome." at 1465.

We conclude that if evidence such as we have described had been offered at the penalty phase, there is a reasonable probability that the result of the proceeding would have been different, i.e., that a sentence of life as opposed to death would have been rendered by the jury. Therefore,

we affirm the district court on the issue of ineffective counsel at sentencing.

In affirming we cannot agree with several other findings entered by the district court. The court found that Bishoff never attempted to contact family members except for defendant's brother and that in fact he never did contact family members. As appears from evidence set out above, these findings are plainly erroneous. The court found that Bishoff was "patently unreasonable in not presenting mitigating evidence because of his presumption that jury with Christian women on it would not vote for the death penalty." Bishoff's statement was: "I know a majority of those women and children, families, and most of them were of the Christian faith. I did not see how they would bring back a death penalty." This single remark by Bishoff is extracted from a considerable discussion by him of the efforts that he and Hearn had made to know about the jury and of his views concerning the jury. He explained that he knew most of the jurors in the small county. He testified that he and Hearn investigated potential jurors and had another lawyer go over the jury list as well. Clearly Bishoff relied on much more than a theory, that the district court viewed as implausible, that a jury with Christian women would not return the death penalty. The implication, or finding, that he rested on this alone is not supported by the record.

The district court was highly critical of Bishoff's brief closing argument. Except for the absence of mitigating evidence to comment upon, we find it hard to fault him for either brevity or content of the argument. His brief plea for mercy, plus an argument that Ms. Tyler had learned of

her husband's insurance policy only after his death, was not wide of the mark.

The court found that Bishoff was confused about the distinction between the guilt and sentencing phases of the proceedings. We can find no evidence to support this conclusion.

Bishoff had been admitted to the practice of law for about six months and possessed limited trial experience. Based on these two facts alone, the court expressed "serious doubt" that Bishoff was in a position to make a sound judgment call about presentation of mitigating evidence. No court should appoint an inexperienced lawyer to represent the defendant in a death penalty case. The risks to defendant, counsel, the judicial system and the community at large are too great. But the test is performance, not time at the bar.[5]

The Jury Charge Regarding Mitigating Circumstances

The district court found that the charge given to the jury on mitigating circumstances was constitutionally inadequate concluding that it failed to define mitigating cir-

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5. Both appointed lawyers in this case worked on investigation. They talked with each other about what they achieved. Bishoff was lead counsel at trial and conducted most of the trial on behalf of defendant. We need not decide the extent to which in these circumstances trial counsel may be held ineffective if there are failures in seeking out evidence, for it is clear in this case that Bishoff talked to family members about their testifying and did not seek mitigating testimony from them, and that he knew that Ms. Tyler had a good work record and had been in no criminal difficulty. We do not imply that co-counsel Hearn failed in any respect. We merely note that the district court appeared to proceed on an unspoken premise that if there were shortcomings in investigation, preparation, or trial, all were chargeable to Bishoff. This is an issue for another day.

cumstances or to describe their nature and function as required by this circuit's holding in *Spivey v. Zant,* 661 F.2d 464 (5th Cir. Unit B 1981). The particular instruction given to the jury in this case reads as follows:

> The law provides that the jury shall, before determining the punishment to be imposed, consider evidence in extenuation, mitigation, and aggravation of punishment, all authorized by the law, and in addition it shall consider any statutory aggravating circumstances which may be supported by the evidence. And the only issue at this time is the determination of the punishment to be imposed. Now in addition to the aggravating circumstances presented by the state, I specifically charge you that the law provides that you are to consider mitigating circumstances where there are mitigating circumstances, authorized by the law and warranted by the evidence in arriving at your decision on the appropriate penalty to be imposed. You may consider any matter in this case contended for by the defendant as a mitigating circumstance even though the defendant does not specifically enumerate any particular matter as a mitigating circumstance. Anything about the case that you consider might go in mitigation, you should consider it, and I specifically direct you to do so.

[3-5] In reviewing the adequacy of a jury charge we look to the charge in its entitrety. *Cupp v. Naughten,* 414 U.S. 141, 146-47, 94 S.Ct. 396, 400, 38 L.Ed.2d 368 (1973). This standard applies to the sentencing as well as the guilt innocence phase of a trial. *Westbrook v. Zant,* 704 F.2d 1487, 1501 (11th Cir.1983). Therefore, an appellate court must decide whether the charge given, viewed in the context of the entire instruction, failed to adequately guide the jury with respect to the nature and function of mitigating circumstances. *Morgan v. Zant,* 743 F.2d 775 (11th Cir. 1984). In *Spivey, supra,* the court said that there must be

a clear instruction on mitigation that guides and focuses the jury's objective consideration of the particularized circumstances of the individual offense. 661 F.2d at 471. An instruction regarding mitigating circumstances must normally explain both what a mitigating circumstance is as well as its function in a capital sentencing determination. *Id.* Although the instruction does not specifically have to mention the word "mitigating," it must communicate that the law considers circumstances which reduce punishment and the degree of moral culpability. As this circuit has repeatedly stated:

> An authorization to consider mitigating circumstances is a hollow instruction when unaccompanied by an explanation informing the jury why the law allows such a consideration and what effect a finding of mitigating circumstances has on the ultimate recommendation of sentence.

Finney v. Zant, 709 F.2d 643, 647 (11th Cir.1983) (quoting *Westbrook*).

[6] While we conclude that the instruction failed to communicate clearly the weight and consideration the jury should give to mitigating evidence, we cannot say this affected the outcome of the trial. We have already discussed the fact that the jury heard no mitigating evidence because of the ineffectiveness of counsel. Thus, it is unnecessary to rule squarely upon whether the instruction was error, since we reverse because of the absence of mitigating evidence.

Prosecutorial Misconduct

Appellee argued in the district court that certain remarks made by the prosecutor during closing argument in the sentencing phase of her trial were prejudicial.

The district court did not determine whether the prosecutor's statements required relief in this case as it had already decided to grant the writ on two other grounds. Likewise, as we have affirmed the district court on the grounds of ineffective assistance of counsel, we also do not reach the merits on this issue.

The Death Penalty as Cruel and Unusual Punishment for a Domestic Homicide

[7] The appellee argues, in essence, that it is cruel and unusual punishment in violation of the Eighth Amendment to impose the death penalty in a domestic homicide case. Appellee relies upon the Supreme Court case of *Godfrey v. Georgia,* 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed. 2d 398 (1980). This claim is without merit as *Godfrey* does not stand for a blanket proposition that the death penalty constitutes cruel and unusual punishment when imposed for a domestic homicide.

Denial of a Psychiatric Examination

[8] Defense counsel in this case twice petitioned for a psychiatric examination for the appellee. Prior to trial, counsel filed a motion for psychiatric examination for the purpose of determining appellee's competence to stand trial and appellee's sanity at the time of the offense. The trial judge denied the motion. Counsel later requested a psychiatric examination prior to the penalty phase of the trial in response to the trial court's inquiry regarding the presentation of mitigating evidence. Again, the trial court denied the motion. This second request was made upon trial counsel's belief that his client did not have the mental capacity to understand what she had done or what

happened at trial and the fact that he had been unable to effectively communicate with her. However, at no point was there ever a special pleading of insanity. Under Georgia law, without a special plea of insanity, it is within the trial court's discretion to grant or deny a motion for a psychiatric examination. *Cobb v. State,* 244 Ga. 344, 260 S.E.2d 60 (1979). Appellee's contention is essentially that a psychiatric examination would have developed mitigating evidence regarding her mental state and would have been especially useful in the penalty phase of the trial.

[9] The law of this circuit controlling this issue is *Westbrook v. Zant,* 704 F.2d 1487 (11th Cir.1983). In *Westbrook,* the court concluded that the state is required to furnish the services of a psychologist or psychiatrist only in those capital cases deemed appropriate by the state trial court. As we noted above, in the absenec of a special plea of insanity which was not filed here, a request for a psychiatric examination is a matter of trial court discretion in Georgia. The panel in *Westbrook,* concluded there had been no abuse of discretion because the evidence which Westbrook sought could have been demonstrated by other methods such as testimony of friends, relatives, neighbors, or the defendant's own testimony. In this case, the district court concluded that similar evidence could have been presented in Ms. Tyler's case, although trial counsel did not attempt to do so. We are in agreement with the district court.

Because of the amorphous nature of counsel's request for a psychiatric examination as well as the fact that the court in *Westbrook* refused to grant relief based upon a

denial of a psychiatric examination under a fact situation more compelling than this, we affirm the district court on this issue.

Therefore, the judgment of the district court is

AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

DEATH PENALTY

(Filed June 4, 1985)

No. 84-8213

SHIRLEY TYLER,

Petitioner-Appellee,
Cross-Appellant,

versus

RALPH KEMP, Warden,

Respondent-Appellant,
Cross-Appellee.

Appeal from the United States District Court for the Northern District of Georgia

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion February 22, 1985, 11 Cir., 198—, — F.2d —).
(June 4, 1985)

Before GODBOLD, Chief Judge, CLARK, Circuit Judge, and THOMAS*, District Judge.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of

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* Hon. Daniel H. Thomas, U.S. District Judge for the Southern District of Alabama, sitting by designation.

Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Thomas A. Clark
United States Circuit Judge

REHG-6
(Rev. 6/82)

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION

File No. C82-36A

SHIRLEY TYLER,

Plaintiff

vs.

FLOYD JAMES, Warden,

Respondent

MEMORANDUM OPINION AND
ORDER OF COURT

Petitioner, a state prisoner currently incarcerated at the Middle Georgia Correctional Institute, Women's Unit, Hardwick, Georgia, has filed this petition for writ of habeas corpus pursuant to 28 U.S.C. §2254. Petitioner is a thirty-nine year old black woman who was sentenced to death on December 4, 1979 in the Superior Court of Pike County, Georgia, after being convicted of murdering her husband, James Tyler. The petition raises ten grounds for relief, although counsel has focused particularly on only three or four of these. This court initially referred the matter to the Magistrate, who issued a Report and Recommendation addressing each ground. The Magistrate recommended that the petition be dismissed and objections were filed. The petition is currently before this court.

BACKGROUND

At approximately 9:00 p.m. on September 18, 1979 the victim's father was summoned to the Tyler's residence in Zebulon, Georgia, which was next door. Mr. Tyler found his son lying on his stomach on the bedroom floor, quite ill. He had severe abdominal pain, nausea, uncontrolled bowels, and was extremely thirsty. James Tyler was transported to Upson County Hospital in Thomaston, Georgia, where he was treated for viral gastroenteritis over a three-day period. According to the doctor, Shirley Tyler appeared anxious and upset about her husband and remained with him at the hospital.

On October 3, 1979 at approximately 8:00 p.m. Mr. Tyler was again called to his son's house. He found James Tyler in essentially the same condition as he had been two weeks earlier, and took him back to the hospital. Tyler was treated by the same physician who had treated him previously. The doctor testified at trial that Tyler experienced convulsions at the hospital and that his blood pressure was extremely high. He was unable to ascertain the cause of Tyler's condition. He suspected that it was caused by a cerebral hemorrhage, and transferred Tyler to a medical center in Columbus, Georgia for further tests. Tyler was released in early October without having been diagnosed, and began feeling better.

On October 22, 1979 Tyler again became quite ill. The trial testimony indicates that he exhibited the same symptoms as he had on the two prior occasions. He died on the way to the hospital. His doctor was unable to ascertain the cause of death, and an autopsy was conducted (with Shirley Tyler's approval). The pathologist concluded that James Tyler died as a result of poisoning, after finding

a lethal amount of parathion in his body. He was unable to conclusively determine whether the poison was ingested orally or absorbed through the skin.

An investigation into the circumstances surrounding Tyler's death revealed that a poison caller Phoskil (containing parathion, a highly toxic chemical) had been spread around the Tyler home to kill roaches. After several discussions with the petitioner investigators began to suspect that she had poisoned her husband. A written statement was obtained on November 6, 1979, in which petitioner said that on the night of his death she had scraped some of the powder from a drawer and put it in her husband's chili, because she was afraid he would hurt her son. Ms. Tyler would not discuss the two prior illness, and denied poisoning him after this initial statement was made. She was subsequently indicted for the murder of her husband.

At trial petitioner testified that her husband had been depressed and that he committed suicide after she refused to give him the poison. She also testified that he had rolled on the floor during his first illness, and could have been poisoned by absorbing the powder through his skin. The lack of any cognizable defense is illustrated by still other explanations for the poisoning. Ms. Tyler testified that her husband beat her. She also indicated that he thought he was invincible.

The state offered two explanations of Shirley Tyler's motive for killing her hsuband, neither of which was supported with substantial evidence. One theory was that she killed him in order to receive life insurance benefits. Another implication was that she was having an extra-marital affair. Although no motive was clearly established, the

jury found sufficient evidence to convict Shirley Tyler. After a brief sentencing hearing during which no additional evidence was introduced, the jury voted to impose the death penalty based upon their conclusion that Mr. Tyler had undergone "inhuman torture."

On direct appeal to the Georgia Supreme Court, petitioner's conviction and sentence were affirmed. *Tyler v. State,* 247 Ga. 119, 274 S.E.2d 549 (1981). The United States Supreme Court later denied Ms. Tyler's petition for writ of certiorari. *Tyler v. Georgia,* 454 U.S. 882, 102 S. Ct. 364 (1981). On December 30, 1981, the State of Georgia set petitioner's execution date for January 11, 1982.

In early 1982 petitioner filed a petition for writ of habeas corpus in the Superior Court of Baldwin County, Georgia, and requested a stay of execution pending a hearing and ruling on the petition. By order dated January 9, 1982, that petition for stay of execution was denied. The merits of the habeas petition were not addressed. On January 10, 1982 the Georgia Supreme Court refused to review the Superior Court's "denial" and unanimously denied the motion for stay of execution.

The instant petition was filed in this court on January 10, 1982. Accompanying this petiton was an application for a stay of execution. After an emergency hearing on January 10, 1982, this court stayed petitioner's scheduled execution. Following the stay order, the parties in this action filed briefs which fully addressed the grounds alleged. On September 21, 1982 an evidentiary hearing was held before the Magistrate on the following two grounds: 1) ineffective assistance of counsel; and 2) prosecutorial

misconduct in closing argument to the jury. Petitioner testified at the September hearing. A second evidentiary hearing was held on November 30, 1982 during which character evidence was introduced. On September 7, 1983 this court heard oral argument from the parties concerning the Magistrate's Report and Recommendation (issued on June 8, 1983) and recent developments in the law.

The following grounds for habeas corpus relief were addressed by the Magistrate and will be discussed herein: 1) ineffective assistance of counsel, 2) improper jury selection, 3) improper admission of petitioner's incriminating statement, 5) failure to transcribe opening and closing arguments during guilt phase, 6) cruel and unusual punishment under facts of this case, 7) death penalty violates due process in that jury was not told petitioner had no prior criminal record, 8) inadequate jury instructions regarding aggravating and mitigating circumstances, 9) jury instructions on intent improperly shifted bruden of proof, and 10) trial court erred in denying motions for psychiatric examination. The Magistrate found no merit in any of these grounds. Petitioner specifically objected to the findings on grounds 1, 4, 5, 6 and 10.

In reviewing the allegations of this petition, the court's inquiry is limited. Its role is to examine those aspects of the trial affecting petitioner's federal constitutional rights. *Corn v. Zant,* 708 F.2d 549, 555 (11th Cir. 1983). In order to grant habeas corpus relief, it must be determined that petitioner's trial was fundamentally unfair. *Id.*

I. *Ineffective Assistance of Counsel*

The original petition listed seven examples of counsel's alleged ineffectiveness. These allegations include:

1) insufficient support for motion for change of venue, 2) failure to challenge the array of prospective jurors as being underrepresentative of blacks, 3) failure to conduct proper voir dire, 4) failure to present evidence in mitigation at sentencing phase, 5) failure to object to inflammatory and prejudicial remarks by prosecutor during closing argument at sentencing phase, 6) failure to investigate, prepare, and present all available defenses in guilt phase, 7) failure to argue properly against death penalty. The Magistrate addressed each of these, except number six (which was indirectly covered). Petitioner's objections focus particularly on numbers two, four and five.

Before examining the merits of this section of the petition it is necessary to set forth additional factual background regarding the conduct of petitioner's trial. Ms. Tyler was represented by two court-appointed attorneys named Richard A. Bishoff and Eric D. Hearn. Both lawyers were involved in trial preparation, but Mr. Bishoff actually tried the case. Mr. Bishoff was admitted to the bar in June of 1979 and began practicing with Mr. Hearn, who had a year or two of experience. Bishoff was appointed to represent petitioner in November of 1979, after trying a robbery case and an aggravated assault case, each of which took less than a day. He had never been involved in a murder case, much less a capital case.

Mr. Bishoff consulted other attorneys regarding the filing of motions and the conduct of the defense. He filed several pre-trial motions, including a motion to suppress the statement by Ms. Tyler (referred to previously), a motion for change of venue due to pre-trial publicity, and a motion for a psychiatric examination. All of these were eventually denied by the trial court judge.

At trial, Bishoff presented two witnesses for the defense: Shirley Tyler and her oldest son, Tony, who was then thirteen. No evidence was introduced regarding Ms. Tyler's background, such as the fact that she had no criminal record, or that her husband had beaten her. (This information was adduced during hearings before the Magistrate.) Mr. Bishoff prepared his argument to the jury on sentencing during a lunch break after the jury rendered its verdict. (The argument is found at pages 427-430 of the record.) He presented no mitigating evidence during the sentencing phase, and in fact never asked some of Ms. Tyler's closest relatives or her employer if they would testify on her behalf. Mr. Bishoff testified that he did attempt to obtain such evidence but did not find anything which he considered to be helpful. He claims that he made a judgment *not* to present any evidence because he assumed that a jury with "good Christian women" on it would not impose the death penalty.

The constitutional standard for effective assistance of counsel is counsel "reasonably likely to render and rendering reasonably effective assistance." *Davis v. Zant,* No. 83-8244, slip op. at 1197, quoting *MacKenna v. Ellis,* 280 F.2d 592, 599 (5th Cir. 1960), modified, 289 F.2d 928, *cert. denied,* 368 U.S. 877 (1961); *Corn v. Zant,* 708 F.2d at 560. Effective counsel does not mean errorless counsel. *Adams v. Wainwright,* 709 F.2d 1443, 1446 (11th Cir. 1983). In determining whether the standard has been met, the totality of the circumstances and the entire record must be considered. *King v. Strickland,* 714 F.2d 1481, 1485 (11th Cir. 1983). The burden is on the petitioner to establish ineffectiveness and prejudice. *Washington v. Strickland,* 693 F.2d 1243 (5th Cir. Unit B 1982) (en banc), *cert.*

granted, 103 S.Ct. 2451; *King v. Strickland,* 714 F.2d at 1485; *Adams v. Wainwright,* 709 F.2d at 1445.

In order to prevail on a request for habeas corpus relief, the petitioner must prove that "the ineffective assistance created not only 'a *possibility* of prejudice but that [it] worked to [her] *actual* and substantial disadvantage.'" *Washington v. Strickland,* 693 F.2d at 1258, quoting *United States v. Frady,* 456 U.S. 152, 170 (1982); *Foster v. Strickland,* 707 F.2d 1339, 1342 (11th Cir. 1983); *Corn v. Zant,* 708 F.2d at 561. Prejudice means more than mere detriment to petitioner's case. *Adams v. Balkcom,* 688 F.2d 734, 739 (11th Cir. 1982), citing *Washington v. Watkins,* 655 F.2d 1346, 1360 (5th Cir. 1981), *cert. denied,* 456 U.S. 949 (1982).

The Magistrate found that sufficient evidence was submitted in support of the motion for change of venue and that since none of the prospective jurors had any prior substantive knowledge of Shirley Tyler's case there was no basis for a finding of ineffective assistance of counsel on this point. This court agrees with the Magistrate. Petitioner's counsel presented two newspaper clippings at the hearing on the motion, which apparently constituted all of the pre-trial publicity. There is no radio or television station in Pike County. Petitioner has presented no evidence of any pre-trial publicity of which the trial court was unaware at the time of its rulings on the motion for change of venue. This allegation is without merit.

The Magistrate addressed jointly the two challenges to counsel's conduct of the voir dire. The two allegations are that counsel: 1) failed to challenge the racial composition of the venire and to object to the striking of all

blacks by the prosecutor, and 2) failed to conduct a thorough voir dire in order to identify prospective jurors who were biased. The Magistrate found that trial counsel's tactical decision to refrain from challenging the racial composition of the jury panel could not be considered ineffective. He concluded that there was no evidence to support either of these allegations and that counsel was effective during voir dire.

Ms. Tyler was convicted by an all-white jury. As argued by the respondent, petitioner submitted no direct statistical evidence that there were disproportionately few prospective black jurors. In the objections to the Magistrate's Report it is stated that the panel should have been 35% black based on the black population in the community. According to testimony of Mr. Bishoff, all blacks were struck by the prosecutor, who presumably had ten strikes. Therefore, petitioner argues there could only have been ten blacks on the 48 person venire. If so, the venire was only 20% black. (See Transcript of September 21, 1982, Vol. 1, pp. 34-37.) Petitioner argues that the failure to challenge this underrepresentation was another example of counsel's ineffectiveness.

Without actual evidence that the venire was improperly constituted, the court cannot possibly find that counsel was ineffective in failing to object thereto. *See Davis v. Zant,* No. 83-8244 (11th Cir. December 27, 1983). Moreover, counsel's failure to challenge the prosecutor's strikes was a deliberate decision, which cannot be second-guessed by this court. *See Westbrook v. Zant,* 704 F.2d 1487, 1500 (11th Cir. 1983); *Stanley v. Zant,* 697 F.2d 955, 966 (11th Cir. 1983). The court cannot conclude that counsel was ineffective on this ground.

The second challenge to the conduct of voir dire is set forth as a separate basis for habeas corpus relief. The court will address the entire issue of the conduct of voir dire at one time, including the question of whether counsel was ineffective.

Petitioner's most persuasive argument is that counsel's failure to present mitigating evidence constituted ineffective assistance of counsel. The law on this point is constantly developing and the court has thoroughly reviewed the applicable decisions. After careful consideration it has determined that despite the Magistrate's contrary conclusion Mr. Bishoff's handling of the sentencing phase was indeed ineffective, and that habeas corpus relief is appropriate on that basis.

The sentencing phase in any criminal case is crucial, and counsel is obligated to be prepared for that part of the trial. *Stanley v. Zant,* 697 F.2d 955, 963 (11th Cir. 1983). As noted in *King v. Strickland,* 714 F.2d at 1490, the Eleventh Circuit has emphasized the importance of pre-trial preparation and investigation. Failure to present mitigating evidence is clearly a factor suggesting ineffectiveness of counsel. *Id.* at 1491. *See also Douglas v. Wainwright, supra.* If counsel's decision not to present mitigating evidence was strategic and was made after an adequate investigation of the options, it will usually not be deemed ineffective. *Washington v. Strickland,* 693 F. 2d at 1253-54; *Adams v. Wainwright,* 709 F.2d at 1445. Under the current law of this circuit, such a strategic decision will be held ineffective only if it was "so patently unreasonable that no competent attorney" would have done so. *Washington v. Strickland,* 693 F.2d at 1254. In other

words, counsel is not absolutely required to present mitigating evidence if it exists.

The Eleventh Circuit has found that decisions not to present such evidence (such as where it is not particularly persuasive or where it would cause more harm than good) were reasonable and not ineffective. *Stanley v. Zant*, 697 F.2d 955 (11th Cir. 1983); *Adams v. Wainwright*, 709 F.2d 1443 (11th Cir. 1983). The court has also held that such decisions were, in view of the totality of the circumstances, unreasonable and ineffective. *Douglas v. Wainwright, supra; King v. Strickland, supra.* Ultimately, each case turns on its own facts. *Stanley*, 697 F.2d at 964.

It is obviously essential to a proper analysis of this issue to determine whether the failure to present mitigating evidence was "strategic" or was a result of ignorance, lack of diligence, or neglect. The distinction is an important one despite the presumption of the courts that counsel's actions are strategic. *See, Washington v. Strickland*, 693 F.2d at 1257. Although even a strategic decision may be considered ineffective (if patently unreasonable), a failure due to neglect renders petitioner's case much stronger. The presumption of strategic choice can be rebutted by the testimony of trial counsel *or* when counsel's actions "do not conform to a general pattern of a rational trial strategy." *Washington v. Strickland*, 693 F.2d at 1257-58.

The sentencing phase of petitioner's trial consisted solely of the arguments of counsel. Bishoff's argument constitutes three pages of the trial transcript (pp. 327-330). It consists of a rather weak refutation of the prosecutor's closing arguments, such as the following state-

ment: "I think that the time that—the last time he was apparently ill and died from poisoning, that he did not really suffer that much." (p. 328) Bishoff did mention that Ms. Tyler was "under a great deal of strain and pressure" and asked the jury to have mercy on her. He also stated that there was "no proof that she was aware of the insurance policy prior to James's death." After hearing the court's instructions, the jury deliberated for an hour and forty minutes before deciding to impose the death penalty based upon their finding that the defendant inflicted "inhumane torture" (p. 336).

On September 21, 1982 Richard Bishoff testified before Magistrate Dougherty regarding the conduct of Shirley Tyler's defense. He stated that most of the prospective witnesses with whom he discussed the case were Mr. Tyler's relatives who lived nearby. He never talked to Shirley Tyler's grandmother, who raised her, or to her employer, or to her mother's sister. Although he knew she had no criminal record, he did not introduce testimony to that effect. When asked why he presented no mitigating evidence, he responded as follows:

> Well, we had essentially gave it our best shot during the trial, and at that point in the trial, we had seven women on the jury, I didn't see how we were going to get the death penalty, we had nothing else, and the family members, they were all opposed to Shirley, they were all against her.

(p. 42).

Bishoff repeatedly indicated that he felt he was unable to obtain witnesses because the community in Zebulon was not supportive of the petitioner. Many of James Tyler's relatives lived in Zebulon, and it stands to reason

that they would not have made effective defense witnesses. Bishoff never attempted to contact the defendant's friends or family, except for her brother who Bishoff claimed did not want to become involved. Bishoff admitted that he never asked the brother to testify as a character witness. (p. 60)

Bishoff testified that his conduct of the sentencing hearing was a "judgmental decision." He said he was aware of the right to introduce evidence regarding Ms. Tyler's background, such as the absence of any criminal history, and the fact that she worked eight hours a day to support her family. He stated that he did not remember why he decided not to do so. (p. 50) He then said that he did not want to put the defendant on the stand because of problems with her as a witness (she was "not responsive"). The only other reason articulated was that he really did not think there was a risk of receiving the death penalty. Bishoff stated: "I knew a majority of those women had children, families, and most of them were of the Christian faith. I did not see how they would bring back a death penalty." (p. 52)

Despite Bishoff's testimony that his conduct of the sentencing hearing was strategic, the court finds that his "decision" not to present evidence was patently unreasonable. The "decision" was based upon the erroneous conclusion that there were no helpful witnesses available, and upon an irrational presumption that a jury with Christian women on it would not vote for the death penalty. The court considers these reasons, articulated three years after the fact, to be insubstantial.

On November 30, 1982 counsel for petitioner presented the testimony of two witnesses at a hearing before Magi-

strate Dougherty. Savannah Mae Maddox, Shirley Tyler's aunt, testified that she was a good person, and that her husband "was real mean to her, he beat her and drank a lot." (p. 10) Ms. Maddox stated that James Tyler once knocked all of his wife's teeth out. (p. 11) She said that Shirley Tyler worked hard, and was a good mother. According to Ms. Maddox, Bishoff never asked her any questions about Shirley Tyler's background, and never asked her to testify.

Ms. Lula Parks, Shirley Tyler's grandmother, testified about petitioner's good character (e.g. that she was a good wife and good mother). She indicated that James Tyler was "mean" to his wife and that Ms. Parks's husband helped Shirley to move out of the house at one point. (pp. 51-52) The witness stated that James Tyler drank a lot. She said that she did not receive a subpoena for Shirley's trial, and was never questioned about her granddaughter's background. (p. 59) Ms. Parks testified that she would have taken the stand as a character witness if asked, because she loved her granddaughter and would have done anything for her. Shirley Tyler was born and raised in her grandmother's house.

Bishoff's claimed inability to obtain defense witnesses was apparently due to confusion over the distinction between the guilt and sentencing phases. The testimony of Ms. Parks, Ms. Maddox, and Bishoff reflects that Bishoff's failed attempts to procure witnesses was due to the fact that several of those he contacted knew nothing whatsoever about the facts surrounding Tyler's death. Because these individuals denied knowledge and seemed not to want to "get involved," Bishoff did not pursue the pos-

sibility of using them as character witnesses. This was, in the court's view, a serious and fundamental omission. These witnesses had firsthand knowledge of petitioner as a person with no history of misconduct, who had worked hard to support her family, and whose husband had apparently abused her.

The court concludes that the failure to present their testimony (or that of others who knew petitioner equally well) constitutes ineffective assistance of counsel and meets the actual prejudice standard in *Washington v. Strickland.* Furthermore, in the context of the entire case, the state has not shown that counsel's failure was harmless error beyond a reasonable doubt. *Id.* Aside from the fact that Bishoff had no rational trial strategy, he neglected to pursue several lines of defense through the use of character witnesses. It is clear to the court that the failure to introduce this substantial mitigating evidence was prejudicial to the petitioner, and that habeas corpus relief is warranted on this basis. *See Zant v. Hamilton,* 251 Ga. 552 (1983) (in which the Supreme Court of Georgia set aside a death sentence based upon a finding that the failure to present mitigating evidence in the sentencing phase constituted ineffective assistance of counsel).

In making this ruling the court has not overlooked the fact that Bishoff had only been admitted to the practice of law for about six months and possessed very limited trial experience. Given these facts, the court seriously doubts that Bishoff was in a position to make a sound judgment call on such a difficult matter. Furthermore, his partner was far from being a seasoned criminal lawyer after less than two years of practice.

The remaining allegations of ineffective assistance of counsel can be addressed summarily. The claim regarding Bishoff's failure to object to the prosecutor's "inflammatory and prejudicial" comments during closing argument at the sentencing hearing is effectively moot, since the court has concluded that petitioner is entitled to a new sentencing hearing. *See, Davis v. Zant,* No. 83-8244 (11th Cir. Dec. 27, 1983), slip op. at 1198. The court will briefly address this issue later in this order when discussing the other grounds in the petition.

Petitioner contends that she was denied effective assistance of counsel during the guilt phase of her trial because Bishoff failed to investigate, prepare and present all available defenses. The court does not find that Bishoff was ineffective during the guilt phase in view of the standards enunciated by the Eleventh Circuit. Bishoff's failure to introduce evidence about petitioner's background does rise to the level of a constitutional deprivation, but this applies more strongly to the penalty phase as opposed to the guilt or innocence determination.

The court agrees with petitioner's claim that counsel's argument during the sentencing hearing was ineffective, but this in itself does not support her Sixth Amendment claim. Taken together with the failure to present mitigating evidence, the court holds that there *is* a basis for granting habeas corpus relief. Accordingly, the court will order that Shirley Tyler be resentenced.

II. Jury Composition

This ground has two elements. Petitioner first contends that her rights were violated by the systematic ex-

clusion of prospective jurors solely because of their conscientious or religious scruples against the death penalty. She also specifically challenges the exclusion of two members of the venire who expressed doubt about whether they could impose the death penalty, based upon *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

This circuit has repeatedly rejected the argument that the exclusion of "death-scrupled jurors" violates the requirement of having a jury selected from a representative cross section of the community. *See, Spinkellink v. Wainwright*, 578 F.2d 582, 597-98 (5th Cir. 1978), *cert. denied*, 440 U.S. 976 (1979); *Smith v. Balkcom*, 660 F.2d 573, 576-78 (1981), modified 671 F.2d 858 (5th Cir. Unit B 1982), stay granted pending application to Supreme Court, 677 F.2d 20 (5th Cir. Unit B), *cert. denied*, 103 S.Ct. 181 (1982); *Corn v. Zant*, 708 F.2d at 565. These decisions all hold that when the mandates of *Witherspoon* are followed the "representative cross-section requirement" is met.

In *Witherspoon* the Supreme Court held that venire persons may not be excluded for cause "simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." 391 U.S. at 522. The Court held that exclusion is permissible when a venire person makes it unmistakably clear that he or she would automatically vote against the death penalty without regard to the evidence, or that his or her attitude toward the death penalty would impair the ability to be impartial. *Id.* at 522 n.21. *See also, Adams v. Texas*, 448 U.S. 38, 44 (1980).

In a recent *en banc* decision, the Eleventh Circuit considered whether non-verbal responses and group voir dire

were per se violations of *Witherspoon,* and found that they were not. In so holding, the Court stated:

> *Witherspoon,* however, does not require that any one form of voir dire be used or that a juror's philosophical reasons for opposing the death penalty be explored. Instead, it only requires that the method employed and the questions asked evoked non-ambiguous answers that satisfied the *Witherspoon* 'unmistakably clear' standard.

McCorquodale v. Balkcom, No. 82-8011, slip op. at 1260 (11th Cir. Dec. 30, 1983) (en banc). This standard, when applied to the present case. leads the court to conclude that the exclusion of jurors for cause was appropriate.

A total of three jurors were excused for cause, two of those based upon their opposition to capital punishment. The first juror was dismissed after the following transpired:

> MR. CALDWELL: Are any of you jurors conscientiously objected to capital punishment; that is, are any of you jurors conscientiously objected to the death penalty? If you are opposed to giving somebody the death penalty in a case where the evidence may warrant, will you please rise at this time?
>
> (Prospective juror rises.)
>
> Q MR. CALDWELL: Your name, please, sir?
>
> A PROSP. JUROR REEVES: Otha Reeves.
>
> Q Sir?
>
> A Otha T. Reeves.
>
> THE COURT: Let him come in the box, Mr. Caldwell. You folks vacate the box, please.
>
> (Prospective juror complying.)

MR. CALDWELL: Anyone else that is conscientiously objected to capital punishment, please rise at this time.

(NO RESPONSE FROM ANYONE.)

MR. CALDWELL: Mr. Reeves, have a seat right up there, please sir.

(Prospective juror Reeves complying.)

Q MR. CALDWELL: Mr. Reeves, do you believe that based on the opinion that you presently have, that you could not vote for the death penalty in this case, if the evidence so warranted?

A PROSP. JUROR REEVES: No, I couldn't.

Q You could not?

A No.

Q You feel that at this time you are irrevocably opposed; that is, no matter what the evidence may show, you could not vote for the death penalty?

A Right.

Q Is that correct?

A Right.

MR. CALDWELL: I believe that would disqualify that juror, Your Honor.

THE COURT: I think so. —Do you want to ask him anything about that?

MR. BISHOFF: No, sir, not that particular juror, Your Honor.

THE COURT: All right.

MR. BISHOFF: —I'm satisfied with Mr. Caldwell's statement.

THE COURT: All right, sir, you can have a seat back out there.

(Prospective juror Reeves complying.)

(Trial Transcript, pp. 7-9.)

The court finds that these questions and responses meet the *Witherspoon* requirements and that exclusion of this juror was permissible.

At pages ten and eleven of the trial transcript, the following transpired:

(Prospective jurors seated in box.)

MR. CALDWELL: Ladies and gentlemen, I'm Johnnie Caldwell, Jr., and I'm the District Attorney here in this circuit, and the case that we presently have before you at this time, is the case of the State of Georgia versus Shirley Tyler. Shirley Tyler is charged with murder, in this instance. And I only have a few questions to ask each of you, and I can do that as an entire panel, instead of individually.

First, is there any reason, either legal or moral, that you feel that you could not sit on a case of someone who is charged with the offense of murder?

PROSP. JUROR CLARENCE DEWBERRY: (raises hand).

MR. CALDWELL: Sir?

PROSP. JUROR DEWBERRY: I don't believe I— I rather not be.

MR. CALDWELL: Could you sit on this case, sir?

PROSP. JUROR DEWBERRY: No, sir, I—

MR. CALDWELL: You don't believe that you could sit on this case and be unbiased in it?

PROSP. JUROR DEWBERRY: Unh-unh.

MR. CALDWELL: You feel that your present feelings that you presently have, would lead you to be

biased either for the State, or for the defendant; is that what you're telling this Court?

PROSP. JUROR DEWBERRY: I— what I'm trying to say, I just rather not be on it.

MR. CALDWELL: You don't feel like you could be fair; is that what you're trying to tell us?

PROSP. JUROR DEWBERRY: Right.

MR. CALDWELL: What is your name, please, sir?

PROSP. JUROR DEWBERRY: Clarence Dewberry.

MR. CALDWELL: Sir?

PROSP. JUROR DEWBERRY: Clarence Dewberry.

THE CLERK: Clarence Dewberry.

THE COURT: I think that's what he's saying. Are you gentlemen in agreement that this juror can be excused?

MR. CALDWELL: Yes, Your Honor.

MR. BISHOFF: Yes, I agree, Your Honor.

THE COURT: All right, you can take him off.

The propriety of excluding this juror is not a *Witherspoon* question, since he never voiced opposition to the death penalty or expressed the direction of his bias.

A third juror was excluded based upon this exchange:

MR. CALDWELL: Do any of you feel that you could not sit on a case of one who is charged with murder and in which the death penalty is being sought by the State?

(NO RESPONSE FROM ANYONE.)

MR. CALDWELL: Do each of you feel that if the evidence so warranted and the defendant was found guilty, that you could vote for the death penalty; that is, to have somebody put to death, if the evidence so warranted the same in this case? Do you feel that each of you could do that? If not, please let me know, right now.

(Prosp. juror raises hand.)

MR. CALDWELL: What's your name, please, sir?

PROSP. JUROR CALVERT: C.O. Calvert, C-a-l-v-e-r-t.

Q MR. CALDWELL: Mr. Calvert, do you feel like that your opinion is fixed to such an extent that regardless of what the evidence might show, that you could not vote for the death penalty?

A Yes, sir.

Q You feel that it is?

A Yes, sir.

MR. CALDWELL: Do you want to inquire?

MR. BISHOFF: No, I'll agree with your judgment on that.

THE COURT: All right, sir. You're excused. Have a seat back out there.

(pp. 44-45.) Again, these questions and answers were appropriate and reflect an unmistakable bias which is a sufficient basis for exclusion. In sum, there is no merit to petitioner's claims regarding jury selection or composition and consequently the claim of ineffective assistance of counsel on voir dire is groundless.

III. *Admission of Coerced Statement*

The most incriminating evidence introduced by the state was petitioner's admission to a GBI agent that she

"did it." The written statement in petitioner's handwriting, made on November 6, 1979, said (essentially):

> Yes I did it he was going to hurt my son Tony and I not stand this because he hurt him once before and I give him a little teaspoon full in his chili and beans. His mother put it in a drawer and I set a little of this out of the drawer.

(State's Exhibit No. 7.)

A *Jackson v. Denno* hearing was held at the trial (outside the presence of the jury) for the purpose of determining whether this statement was voluntarily given. (Trial transcript, pp. 181-200.) The trial court admitted the statement over counsel's objection. The Magistrate rejected petitioner's argument that the statement was involuntarily extracted through promises or threats at a time when she was incapable of either maintaining her right to silence or of knowingly waiving her rights.

According to the testimony of Agent Greene of the GBI, Ms. Tyler gave the statement voluntarily, after being advised of her *Miranda* rights. He testified that she was not threatened or coerced in any way, that she did not request an attorney, and that she read and signed a waiver form. He also stated that she did not appear agitated, emotionally disturbed or incoherent. (pp. 189-197.) This testimony constitutes a *prima facie* showing of voluntariness.

There is no evidence in the record of a violation of petitioner's fourth or fifth amendment rights. If the evidence indicated that the statement was given during a period of mental incompetency or insanity it would be considered involuntary, but "mere emotionalism and confusion" would not necessarily render it invalid. *Corn v. Zant,* 708 F.2d at 567, *quoting Sullivan v. Alabama,* 666

F.2d 478 (11th Cir. 1982). In this case, Ms. Tyler admitted on the stand that she willingly cooperated with the GBI, and specifically that the statement was voluntary. (pp. 274-75.) There is no indication of coercion or of incompetence. The court agrees with the Magistrate that this allegation is meritless.

IV. *Improper Comments by Prosecutor*

Petitioner contends that prejudicial remarks were made by the prosecutor during closing argument in both the guilt/innocence and sentencing phases of her trial. There is no transcript of the closing arguments made in the guilt/innocence phase. (The failure to transcribe is raised as a ground for habeas corpus relief.) Therefore, petitioner is unable to show that error was made in closing argument during the guilt/innocence phase. As to the sentencing hearing, petitioner argues that by drawing the jury's attention to petitioner's exercise of her rights, by expressing his personal opinions and by explaining his reasons for seeking the death penalty, the prosecutor violated her constitutional rights. (The prosecutor's arguments are found at pp. 319-327.) The Magistrate found that petitioner failed to carry the burden of proof required to establish such a denial of constitutional rights. In her objections to the Magistrate's Report and Recommendation, it is stated that the prosecutor "became a witness and testified about other murders" which was "highly prejudicial and denied petitioner due process of law." (See p. 322 of trial transcript.)

Since the court has already decided to remand the case for resentencing, it is not necessary to address this issue in detail. *See, Davis v. Zant,* No. 83-8244, slip op. at

1198 (11th Cir. Dec. 27, 1983). In order to prevail on this claim petitioner must show that the prosecutor's actions were so egregious as to render the trial fundamentally unfair. *Moore v. Zant,* No. 82-8683, slip op. at 1115 (11th Cir. Dec. 20, 1983) citing *Hance v. Zant,* 696 F.2d 940, 950 (11th Cir. 1983). The court is to consider the totality of the circumstances and must particularly recognize that "a prosecutor should not play on the passions of the jury." *Id. See also, Brooks v. Francis,* 716 F.2d 780, 788 (11th Cir. 1983); *Darden v. Wainwright,* 699 F.2d 1031 (11th Cir. 1983).

After reviewing the record of the prosecutor's closing argument, the court is of the opinion that unnecessary and possibly prejudicial comments were made. The reference to other homicides and the comparison of those crimes to the case at bar was inappropriate and inflammatory. It is not necessary to determine whether these arguments constitute due process violations, since petitioner will be resentenced. The court directs counsel's attention to the guidelines set forth in *Brooks v. Francis,* 716 F.2d at 789-790 for the proper conduct of closing argument during the sentencing phase.

V. *Failure to Transcribe Closing Argument*

Trial counsel's motion to record the complete proceedings was denied, in that the trial court did not require that the arguments of counsel be transcribed. The trial judge ordered transcription of any objections made during arguments of counsel, and Bishoff did not object. Petitioner strenuously argues that she has been denied due process and equal protection "by being forced to perfect her appeal without a complete record of the trial court

proceedings." The Magistrate rejected this argument based upon *Stephens v. Zant,* 631 F.2d at 402-404 (5th Cir. 1980), and upon petitioner's failure to allege or offer evidence of any erroneous, inflammatory, or prejudicial remarks.

The court is mindful of the requirement imposed by the Supreme Court that each sentence of death must be reviewed to determine, *inter alia,* whether it was imposed under the influence of passion or prejudice. *Gregg v. Georgia,* 428 U.S. 153, 198 (1976); O.C.G.A. 17-1035(c)(1). Nevertheless, "it is settled that failure to transcribe counsel's arguments is not a constitutional violation requiring vacation of a death sentence." *Corn v. Zant,* 708 F.2d at 560, citing *Stephens v. Zant, supra.* Without any indication that prejudicial remarks were actually made by the prosecutor, and because the record is sufficient as it stands for making the required determination, the court must reject petitioner's argument.

VI. *Death Penalty Constitutes Cruel and Unusual Punishment in this Case*

Petitioner's argument in support of this ground is unclear. In the original petition, Ms. Tyler attacks the jury instructions on aggravating and mitigating circumstances as "perfunctory" and argues that the death penalty was inappropriate in this case. This challenge to the instructions constitutes a separate ground for relief. (See Sec. VIII, *infra.*) In her objections to the Magistrate's Report and in the Amendment to Petition for Habeas Corpus (filed October 8, 1982) petitioner clarifies somewhat the contention that the death penalty in this case violates the eighth amendment. The amended petition asserts that the

alleged offense was not outrageously and wantonly vile, horrible or inhuman within the meaning of *Ga. Code Ann.* § 27-2534.1(b)(7). This amounts to a contention that the jury's finding was against the weight of the evidence, but also supports the argument that, quite simply, under the facts of this case the death sentence was not warranted. In other words, because this was a domestic homicide and because the evidence allegedly does not support the jury's finding of an aggravating circumstance, petitioner argues that her sentence should be set aside.

Again, because the court has determined that Shirley Tyler should be resentenced, these arguments need not be addressed. The court simply notes that the sentencing guidelines enacted by the Georgia legislature have been approved by the Supreme Court and that as long as these guidelines are followed the state may seek and impose the death penalty. *See, Corn v. Zant,* 708 F.2d at 563. Domestic homicides have not been excluded from this statutory scheme, despite the Supreme Court's holding in *Godfrey v. Georgia,* 446 U.S. 434 (1980). *See also, Gilreath v. State,* 247 Ga. 814, 279 S.E.2d 650 (1981), *cert. denied,* 102 S.Ct. 2258 (1982). The court does not agree that "the mere poisoning of one's spouse" cannot justify the imposition of the death penalty or that it was unreasonable for the jury to find that the "b-7" aggravating circumstance was present under the facts. The jury instructions will be examined herein.

VII. *Death Sentence Violates Due Process Because of Court's Failure to Apprise Jury of Petitioner's Lack of Criminal Record*

The court has already held that counsel's failure to introduce mitigating evidence violated petitioner's constitu-

tional rights. The importance of the fact that she had no prior record of any criminal activity cannot be denied. Georgia law does indeed require that a sentencing judge receive evidence of prior criminal convictions, or the absence of such, prior to the imposition of sentence in felony cases. O.C.G.A. 17-10-2. Nevertheless, there is no authority for the argument that the failure of the court in a capital case to inform the jury of the defendant's non-criminal past constitutes a denial of due process.

The mitigating circumstances which may be considered by a judge or jury are not limited or defined by either the statutory or case law. O.C.G.A. 17-10-30; *Redd v. State,* 242 Ga. 876, 252 S.E.2d 383 (1979). Mitigating evidence is to be introduced by the defendant. The court is under no obligation to ensure its presentation or to identify such mitigating circumstances in its instructions. *Id.; Spivey v. Zant,* 661 F.2d 464 (5th Cir. Unit B 1982). It is *counsel's* duty to present this information to the jury and to the court, and counsel's failure to do so in this case has already been discussed. This ground is also without merit.

VIII. *Jury Instructions Inadequate on Aggravating and Mitigating Circumstances*

Petitioner contends that the trial court inadequately defined aggravating and mitigating circumstances, failed to explain the weighing of aggravating and mitigating circumstances and failed to inform the jury that a life sentence could be imposed even if a statutory aggravating circumstance were found to exist. (The court's instructions on these matters are found at pages 331-335 of the transcript.) The Magistrate found that the instructions were adequate both under Georgia law and pursuant to the

Supreme Court's guidelines as enunciated in *Godfrey v. Georgia,* 446 U.S. 430 (1980).

Since this issue pertains only to sentencing it is not necessary to examine it in great detail. After reviewing all of the instructions the court finds that they were not sufficient to channel the jury's discretion as required by *Gregg v. Georgia,* 428 U.S. 153 (1976). *See Corn v. Zant,* 708 F.2d at 558-59 and 560-61; *Moore v. Zant,* No. 82-8683, slip op. at 1113-1115 (11th Cir. Dec. 20, 1983); *Spivey v. Zant,* 661 F.2d 464, 467-72 (5th Cir. Unit B 1981); *Westbrook v. Zant,* 704 F.2d 1487, 1500-1503 (11th Cir. 1983). The instructions very clearly stated that a death sentence could only be imposed if the jury found "beyond a reasonable doubt that the offense was committed under one or more statutory aggravating circumstances." (p. 334.) The jury was also repeatedly told that it could impose a life sentence even if it found that there were aggravating circumstances present. However, the court failed to define mitigating circumstances or to describe their nature and function.

In *Spivey v. Zant,* 661 F.2d at 471, the Court stated:

> In light of *Lockett, Gregg,* and *Chenault,* we hold that the eighth and fourteenth amendments require that when a jury is charged with the decision whether to impose the death penalty, the jury must receive clear instructions which not only do not preclude consideration of mitigating factors, *Lockett,* but which also "guid[e] and focu[s] the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender . . ." *Jurek v. Texas,* 428 U.S. at 274, 96 S.Ct. at 2957. In most cases, this will mean that the judge must clearly and explicitly instruct the jury about mitigating cir-

> cumstances and the option to recommend against death; in order to do so, the judge will normally tell the jury what a mitigating circumstance is and what its function is in the jury's sentencing deliberations. The constitution does not require the use of the words "mitigating circumstances." So long as the instruction clearly communicates that the law recognizes the existence of circumstances which do not justify or excuse the offense, but which, in fairness or mercy, may be considered as extenuating or reducing the degree of moral culpability and punishment, *Coker v. Georgia,* 433 U.S. 584, 590-91, 97 S.Ct. 2861, 2865, 53 L.Ed.2d 982, this portion of the constitutional requirement is satisfied.

The instructions on mitigating circumstances in this case were as follows:

> Now, in addition to aggravating circumstances presented by the State, I specifically charge you that the law provides that you are to consider mitigating circumstances where there are mitigating circumstances, authorized by the law and warranted by the evidence in arriving at your decision on the appropriate penalty to be imposed. You can consider any matter in this case contended for by the defendant, as a mitigating circumstance, even though the defendant does not specifically enumerate any particular matter as a mitigating circumstance. Anything about the case that you consider might go in mitigation, you should consider it, and I specifically direct you to do so.

(p. 332.)

Otherwise, the instructions were, as in *Spivey,* "devoted almost exclusively to a discussion of aggravating circumstances and their function in determining sentence." 661 F.2d at 472.

The trial court failed to communicate clearly to the jury "that the law recognizes the existence of facts or cir-

cumstances which, though not justifying or excusing the offense, may properly be considered in determining whether to impose the death sentence." *Id.* This constitutes a basis for setting aside the sentence, even in this case where the jury may not have had any mitigating evidence to consider. *See Westbrook v. Zant,* 704 F.2d at 1503.

IX. *Improper Burden Shifting in Jury Instructions on Malice and Intent*

Petitioner contends that the jury instructions in the guilt/innocence phase allowed the prosecution to prove its case without establishing all elements of the crime beyond a reasonable doubt, and that the burden of proof was shifted to the petitioner to prove lack of intent or malice (without specifying the quantum of proof required). Since no argument has been made on this point, the court is uncertain about petitioner's specific objections to the charges. The Magistrate assumed, as does this court, that this is a "*Sandstrom*" claim. The Supreme Court ruled in the case of *Sandstrom v. Montana* that a charge which involves a presumption that shifts the burden of proof onto the accused is unconstitutional as violative of the due process clause. 442 U.S. 510 (1979).

In examining the instructions for possible constitutional violations the critical question is whether a reasonable jury could have failed to understand, from the entire charge, that a presumption of intent or malice was rebuttable. *Corn v. Zant,* 708 F.2d at 558, citing *Sandstrom.* The Eleventh Circuit has addressed this question in several recent decisions, but since each set of instructions differs the analysis must be made on a case-by-case basis. *See, Goodwin v. Balkcom,* 684 F.2d 794 (11th Cir. 1982); *cert.*

denied, 103 S.Ct. 1798; *Lamb v. Jernigan,* 683 F.2d 1332 (11th Cir. 1982), *cert. denied,* 103 S.Ct. 1276; *Hearn v. James,* 677 F.2d 841 (11th Cir. 1982); *Mason v. Balkcom,* 669 F.2d 222 (5th Cir. Unit B 1982), *cert. denied,* 103 S.Ct. 1260; *Davis v. Zant,* No. 83-8244, (11th Cir. Dec. 27, 1983). The decisions emphasize that it is the entire charge which must be evaluated as a whole, and that a single erroneous instruction does not necessarily result in a constitutional violation.

After carefully reviewing the charge in this case the court concludes that petitioner's allegation is meritless. (See pp. 298-317 of trial transcript.) The court instructed the jury repeatedly that the burden was upon the state to prove every element of the offense beyond a reasonable doubt, including intent (p. 300). The court told the jury that every person is presumed to be of sound mind and discretion, that a person is presumed to intend the natural and probable consequences of his acts, which are presumed to be the product of a person's will. Accompanying each of these instructions was the statement "that presumption may be rebutted." The court went on to tell the jury:

> Now, these presumptions to which I've referred are merely— they merely describe permissive inferences. You may infer that conclusion, but you have a choice. Presumptions are not mandatory. These presumptions are not conclusive, nor do they put any burden of persuasion whatsoever upon the accused.
>
> If an accused person chooses to offer some evidence in rebuttal to the presumption, the accused only has a burden of production, and never a burden of persuasion.

(p. 300.)

These instructions speak for themselves. They are clear and fair. The charge as a whole was beyond reproach with regard to the state's burden of proof and the presumption of innocence. The court concludes that there has been no violation of petitioner's due process rights.

X. *Improper Denial of Motion for Psychiatric Examination*

As a final ground for relief petitioner contends that the trial court erred in denying counsel's motions for a psychiatric examination both prior to trial and before sentencing. She contends that this was based upon her indigency and was therefore a denial of equal protection. The refusal to order a psychiatric examination is also said to be a denial of due process because it prevented petitioner from presenting mitigating evidence in the form of psychiatric testimony.

Trial counsel twice requested a psychiatric evaluation based upon his problems communicating with Ms. Tyler, her "rambling incoherency" and the difficulty he had preparing for trial. (Transcript, pp. 294-295.) The second request was made in response to the court's inquiry regarding presentation of mitigating evidence. Mr. Bishoff stated: (p. 318)

> Your Honor, if I may, in dealing with Mrs. Tyler, it's come to our attention I don't know that she has the mental capability of really understanding what she's done, or what has happened here. I think during our work with her, she's had problems understanding very basic questions. She's been incoherent at times. And I really think that she deserves some type of psychiatric analysis or examination prior to sentencing.

The court responded:

> That's out of my hands at this stage. What I'm asking is do you have any evidence you want to present to this jury, in mitigation of punishment?

Mr. Bishoff answered that he did not have any such evidence.

Petitioner now contends that the need for a psychiatric evaluation was "particularly acute." Her motivation for killing her husband was "far from clear." The fact that James Tyler physically abused his wife (and apparently her son Tony as well) may have affected her psychological state at the time of the offense. Counsel asserts that the jury should have had access to an expert's insight in order to understand Shirley Tyler's mental condition. With such information, it is argued, the jury could have found that her actions were not "sufficiently deliberate to warrant the death penalty." *Granviel v. Estelle,* 655 F.2d 673, 676 (5th Cir. 1981).

In response to these contentions the state argues that the granting or denial of such a motion, under Georgia law, lies within the sound discretion of the trial court. Since "not one scintilla of evidence" supports the assertion that an examination would have uncovered favorable evidence, the state argues that there is no merit to this claim. Furthermore, the record does not substantiate the allegation that the motion was denied because of petitioner's indigence. The state asserts that the motion was rightfully denied because there was no indication of any impairment warranting an examination.

The Magistrate agreed with the state, finding that "any assumption by this Court (of a mental problem), in

light of the void in the record, would be mere speculation. This ground is without merit." The petitioner strenuously objects to this finding.

In *Westbrook v. Zant,* the Eleventh Circuit examined a claim that the denial of a request for psychiatric assistance deprived the defendant of his constitutional right to present evidence in mitigation. The court considered the Supreme Court's decisions concerning the importance of mitigating evidence [*Lockett v. Ohio,* 438 U.S. 586 (1978); *Gregg v. Georgia,* 428 U.S. 153 (1976); *Eddings v. Oklahoma,* 455 U.S. 104 (1982)] and analyzed the rights of an indigent capital defendant under *Bounds v. Smith,* 430 U.S. 817 (1977). The court concluded that *Lockett* and *Gregg* place an "affirmative duty on the state to provide the funds necessary for production of evidence." 704 F.2d at 1496. However, the state is required to furnish the services of a psychologist or psychiatrist only "in those capital cases deemed appropriate by the state court." *Id.* In the absence of a special plea of insanity, a request for a psychiatric examination is a matter of trial court discretion under Georgia law. Therefore, the "abuse of discretion standard" applies in reviewing the trial court's decision. *Id.* at 1497. *See Cobb v. State,* 244 Ga. 344 (1979); *Crenshaw v. State,* 244 Ga. 430 (1979).

In *Westbrook,* the Court's finding that there had been no abuse of discretion was based upon its determination that "the evidence for which Westbrook sought a psychologist could have been demonstrated by other methods" such as the testimony of friends, relatives, neighbors, or the defendant's own testimony. 704 F.2d 1497. Although such evidence does not carry the weight of expert testimony, it could raise doubts in the minds of jurors regard-

ing a defendant's competence or emotional state. Such evidence could also have been presented in Shirley Tyler's case, although trial counsel obviously did not attempt to do so.

This court sympathizes to an extent with petitioner's argument that this is a "Catch-22" situation. The reason for the trial court's denial of the motion is unclear, and may never be identified. The argument that there has been a denial of constitutional rights is difficult to prove without *evidence* of an abuse of discretion, and such evidence would most likely take the form of psychiatric testimony. No such evidence exists. If an examination were to be conducted now, years after the alleged offense, the relevance of its results might be questionable.

Despite the apparent unfairness of this situation, the court is unable to conclude that the trial court abused its discretion in denying petitioner's motion for a psychiatric examination. Although the record shows that Ms. Tyler was not a good witness, was at times difficult to understand, and was unable to communicate effectively with trial counsel, this court does not find that the abuse of discretion standard has been met. This ground is without merit.

CONCLUSION

The court has thoroughly reviewed the record and has concluded that petitioner was denied effective assistance of counsel during the sentencing phase due to her lawyer's failure to present mitigating evidence. In addition, the trial court's instructions to the jury regarding mitigating evidence were found to be defective.

Accordingly, habeas corpus relief is hereby GRANTED as it pertains to the imposition of the death

sentence. This case is REMANDED to the Superior Court of Pike County; respondent is hereby ORDERED to commence resentencing procedures within 120 days from the date on which this judgment becomes final. Failure to do so will result in the imposition of a life sentence without further order of this court. Respondent is DIRECTED to file a certified copy of petitioner's new sentence, if such is obtained, with the clerk of this court.

SO ORDERED, this 15th day of February, 1984.

/s/ HORACE T. WARD
United States District Judge

APPENDIX "D"

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION 82-36

SHIRLEY TYLER,

Petitioner,

vs.

FLOYD JAMES, WARDEN,

Respondent.

REPORT AND RECOMMENDATION

(Filed June 8, 1983)

Petitioner, a state prisoner presently incarcerated at the Middle Georgia Correctional Institute, Women's Unit, Hardwick, Georgia, has filed this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner seeks habeas corpus relief from the sentence of death for the offense of murder imposed upon her by the Superior Court of Pike County, Georgia, in December 1979. Petitioner raises eleven grounds, alleging: (1) ineffective assistance of counsel; (2) that her jury was underrepresentative in that no prospective jurors were allowed to serve if they expressed a conscientious or religious disapproval of the death penalty; (3) the jury was improperly qualified; (4) Petitioner's in-custody statement to police was improperly admitted into evidence; (5) petitioner's right to fundamental fairness was denied when the prosecutor made improper statements during closing argument; (6) the failure to transcribe opening and closing statements of trial counsel is constitutionally fatal; (7) the death sen-

tence constitutes cruel and unusual punishment under the facts of this case; (8) the death sentence was improperly imposed; (9) the court's jury instructions on malice and intent were improper in that they improperly shifted the burden of proof to petitioner; (10) the trial court erred in its instructions relating to aggravating and mitigating circumstances; and (11) petitioner's motion for psychiatric examination unconstitutionally prevented her from presenting critical evidence.

On direct appeal to the Georgia Supreme Court, petitioner's conviction and sentence were affirmed. *Tyler v. State,* 247 Ga. 119, 274 S.E.2d 549 (1981). The United States Supreme Court later denied Ms. Tyler's petition for writ of certiorari. *Tyler v. Georgia,* 454 U.S. 882, 102 S.Ct. 364 (1981). On December 30, 1981, the State of Georgia set petitioner's execution date for January 11, 1982.

In early 1982, petitioner filed a petition for writ of habeas corpus in the Superior Court of Baldwin County, Georgia. By order dated January 9, 1982, that petition for writ of certiorari was denied. Petitioner then filed an application for certificate of probable cause in the Georgia Supreme Court. On January 10, 1982, the Georgia Court unanimously determined that the application for certificate of probable cause failed to set forth probable cause for it to review the denial of the applicant's habeas corpus petition.

The instant petition was filed in this Court on January 10, 1982. Accompanying this petition was an application for a stay of execution. By order dated January 10, 1982, petitioner's scheduled execution was stayed by the district court. Following the stay order, the parties in this

action filed briefs which fully addressed the grounds alledged. On September 21, 1982, a hearing was held before the undersigned Magistrate on the following two grounds: (1) the ineffective assistance of counsel; and (2) prosecutorial misconduct in closing argument to the jury. Petitioner testified at the September hearing. Later, on November 30, 1982, an additional hearing was held before the undersigned Magistrate wherein character testimony was heard from two of petitioner's family members.

Respondent does not contest exhaustion. All state remedies have been exhausted. Therefore, exhaustion is not an issue in this petition.

I. INEFFECTIVE ASSISTANCE OF COUNSEL

Petitioner's first ground for relief is the very broad allegation that her trial counsel was ineffective, and therefore her subsequent conviction contravenes her constitutional rights. To support this allegation, petitioner proffers six separate arguments which, she contends, would show that her trial counsel was ineffective. Petitioner's six allegations are: (1) petitioner's two trial attorneys failed to properly put evidence before the court to support petitioner's motion for change of venue; (2) the trial attorneys failed to challenge the array of prospective jurors as being underrepresentative of blacks; (3) the trial attorneys failed to conduct proper voir dire examinations of prospective jurors; (4) trial counsel failed to effectively present evidence at the sentencing phase of petitioner's trial; (5) trial counsel failed to object to highly inflamatory and prejudicial closing arguments by the prosecutor; (6) trial counsel failed to properly argue against the death penalty.

The standard for constitutionally effective assistance of counsel is "not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." *Herring v. Estelle,* 491 F.2d 125, 127 (5th Cir. 1974). In applying this standard, the methodology involves an inquiry into the actual performance of counsel conducting the defense and the determination of whether reasonably effective assistance was rendered based on the totality of circumstances in the entire record. *Washington v. Estelle,* 648 F.2d 276 (5th Cir. 1981). It is very clear that the standard does not vary in accordance with whether counsel was retained or appointed. *Cuyler v. Sullivan,* 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). Further, even when it is determined that counsel was seriously inadequate, there must be a showing that the habeas petitioner was to some degree prejudiced thereby. *Washington v. Watkins,* 655 F.2d 1346 (5th Cir. 1981); *Stanley v. Zant,* 697 F.2d 955, (11th Cir. 1983); *Adams v. Balkcom,* 688 F.2d 734 (11th Cir. 1983).

This is a death case. While petitioner does not squarely contend that stricter scrutiny of the attorney's performance is warranted in such cases, the undersigned Magistrate deems it necessary to point out that a heightened scrutiny for determining effective assistance of counsel which is based upon the severity of the punishment imposed is wholly inappropriate. *See Washington v. Watkins,* 655 F.2d 1346, 1356 (5th Cir. 1981).

Petitioner first argues that her trial attorneys failed to properly present evidence in support of her motion for change of venue from Pike County, Georgia. Petitioner's

stated ground for such change of venue was the "extensive and sensational coverage" in the local media. She argues that trial counsel's failure to present evidence regarding community attitudes toward petitioner was constitutionally fatal. However, in the September 21, 1982 hearing before the undersigned Magistrate, petitioner's trial counsel of record, Mr. Richard A. Bishoff, testified that Pike County, Georgia has one weekly newspaper, and one biweekly newspaper. Pike County has neither a radio nor TV station. Mr. Bishoff testified that one article appeared in each of the newspapers (Federal Habeas Corpus Transcript 1 Volume 1; pg. 33, hereinafter FHCT 1, Vol. —). He further testified that he filed a motion for change of venue on the day of arraignment and presented the newspaper clippings to the trial court. The motion was denied (FHCT 1, Vol. 1, 1-34). It appears clear from the voir dire portions of the trial transcript that none of the prospective jurors had any prior substantive knowledge of the Shirley Tyler case (Trial Transcript 12-70, hereinafter T TR——). Consequently, it appears from the totality of the circumstances in the entire record that trial counsel presented sufficient evidence to the court to support petitioner's motion for change of venue. Therefore, trial counsel rendered reasonably effective assistance concerning the change of venue motion.

Next, petitioner alleges that her trial attorneys failed to challenge the array of prospective jurors based on an underrepresentation of blacks on the jury panel. As a third allegation, she alleges that trial counsel failed to conduct a voir dire examination of prospective jurors in a manner designed to identify and challenege those jurors who possessed biases which would prevent them from being

fair and impartial. Since both of these allegations directly deal with the effectiveness of counsel in the voir dire phase of trial, they will be dealt with together.

It should be noted, from the outset, that tactical decisions of counsel do not constitute ineffective assistance simply because, in retrospect, it is apparent that counsel chose the wrong course. *Beckham v. Wainwright,* 639 F.2d 262 (5th Cir. 1981). It is clear from the federal habeas corpus transcript of the first hearing before the undersigned Magistrate that petitioner's trial counsel specifically contemplated the possibility of challenging the composition of petitioner's jury array (FHCT 1 34-37). The decision not to enter such a challenge was one derived solely from his professional judgment. A tactical decision, such as this, is not a sign of ineffective assistance of counsel. *Beckham v. Wainwright,* 639 F.2d 262 (5th Cir. 1981). Petitioner has failed to bring forth any facts, statistics or other type of data to support the allegation that there was an underrepresentation of blacks on her jury arrays. Further, petitioner has failed to present evidence to support her allegation that trial counsel failed to properly conduct voir dire examination of prospective jurors to "weed out" those who could not be fair and impartial. After having reviewed the entire voir dire in petitioner's trial, the undersigned Magistrate concludes that the questions propounded by petitioner's counsel were adequate to determine the fairness and impartiality of the venire persons. Petitioner's trial counsel rendered effective representation in the voir dire phase of the trial.

As a fourth allegation to support the ineffective counsel ground, petitioner asserts that trial counsel failed to present mitigating evidence on petitioner's behalf during

the sentencing phase of trial. Petitioner contends that friends and neighbors should have been called in order to present to the jury some evidence of her character prior to the murder. This allegation essentially challenges the amount, and effectiveness of pre-trial investigation.

Generally, effective counsel must conduct a reasonable amount of pretrial investigation. *Washington v. Watkins,* 655 F.2d 1346, 1355-56 (5th Cir. 1981), *cert. den.* 456 U.S. 949, 102 S. Ct. 2021 (1982). As recently stated by the former Fifth Circuit Court of Appeals:

> The amount of pre-trial investigation that is reasonable defies precise measurement. It will necessarily depend upon a variety of factors including the number of issues in the case, the relative complexity of those issues, the strength of the government's case, and the overall strategy of trial counsel. See, *e.g. Washington v. Watkins,* 655 F.2d at 1357; *Wolfs v. Britton,* 509 F.2d 304, 309 (8th Cir. 1975). In making that determination, courts should not judge the reasonableness of counsel's efforts from the omniscient perspective of hindsight, but rather 'from the perspective of counsel, taking into account all the circumstances of the case, but only as those circumstances were known to him at the time in question.' *Washington v. Watkins,* 655 F.2d at 1356.

Washington v. Strickland, 693 F.2d 1243, 1251 (former 5th Cir. 1982).

In the instant case, the record as a whole in conjunction with the two hearings before the undersigned Magistrate, satisfactorily establishes that petitioner's trial counsel were competent and effective in their pre-trial investigation which was directed at bringing character witnesses into petitioner's trial. Mr. Richard A. Bishoff testified before the undersigned Magistrate, that he, along with co-

counsel, Mr. Eric D. Hearn, spent several hours with petitioner in the Pike County Jail discussing the facts of the case and potential witnesses (FHCT 1, Vol. 1, 27). Mr. Bishoff testified that the list of prospective witnesses, which was based on interviews with petitioner, contained the names of the victim's family members (FHCT 1, Vol. 1, 27-29). Mr. Bishoff did not recall having spoken with petitioner's grandparents. He did however specifically recall speaking with petitioner's brother (FHCT 1, Vol. 1, 28). Mr. Bishoff further testified that he met and interviewed petitioner's children (FHCT 1, Vol. 1, 31). He testified as to his professional conclusion that none of the three children could be relied upon to give credible testimony on behalf of petitioner. The children, it appears, were living with family members of the victim and Mr. Bishoff testified that he was duly concerned as to their loyalties to their mother (FHCT 1, Vol. 1, 31-33). Petitioner's trial counsel further testified that he experienced much difficulty in producing favorable witnesses on petitioner's behalf (FHCT 1, Vol. 1, 43-44). Mr. Bishoff specifically testified that his failure to present character witnesses was based solely upon a complete inability to produce any favorable witnesses in Pike County which he trusted would speak favorably of Shirley Tyler (FHCT 1, Vol. 1, 47). Mr. Bishoff further testified that he contemplated putting Shirley Tyler on the stand during the sentencing phase of her trial (FHCT 1, Vol. 1, 51-53). However, due to her uncooperative nature, he decided that such testimony would not be beneficial (FHCT 1, Vol. 1, 51).

It appears from the record that trial counsel did place a rather naive reliance on the "christian" composition of the trial jury. Mr. Bishoff felt that because the jury was

"christian" in nature, Shirley Tyler would not receive the death sentence. Such a reliance was not, in this case, unduly prejudicial to petitioner. It appears from a totality of the circumstances that Mr. Bishoff did not blindly rely upon such a characterization. He did, in fact, go out into the community and attempt to ferret out favorable character witnesses. He testified that her own children would probably not testify favorably on her behalf. Additionally, there is substantial evidence in the record to substantitate his claim that the Pike County black community may have been hostile towards Shirley Tyler. Consequently, his failure to produce favorable character witnesses, in light of his attempts to so produce, does not render his efforts ineffective.

To further support this conclusion, petitioner's grandmother and aunt, who testified before this Court in November 1982 wholly failed to bring forth any character evidence that would have been likely to make a difference at trial. Specifically, both petitioner's grandmother and aunt testified that any testimony they would have offered at trial could only have been to Shirley Tyler's character prior to the time she moved from Gwinnett County to Pike County. (See FHCT Vol. 2). Since that move was in 1967, their testimony of her character would have referred to a time substantially prior to the murder. While favorable character testimony may have been a mitigating circumstance in the sentencing phase, it does not appear to be evidence that would have made a large difference in her sentence. The jury knew that Shirley Tyler had no prior criminal record. The jury knew that Shirley Tyler had worked to help support her family. The jury was aware that there were no incidents in her past which tend-

ed to indicate that she was a murderess, or had such inclinations. Nonetheless, the jury recommended death.

In light of all the circumstances, it does not seem likely that any of the proffered character testimony would have made a difference to the Pike County jury. Further, trial counsel adequately pursued pre-trial investigation on the possibility of presenting character witnesses, and determined that, under the circumstances it would not be to petitioner's benefit. Consequently, the failure of counsel to present such mitigating circumstances does not amount to constitutionally fatal ineffective assistance of counsel.

Next, petitioner contends that defense counsel failed to object to highly inflammatory and prejudicial closing arguments by the prosecutor during the sentencing phase of her trial. The law is very clear, that the petitioner in a habeas corpus proceeding has the burden of proof to establish sufficient facts to warrant a finding of denial of constitutional rights. *Tyler v. Beto,* 391 F.2d 993 (5th Cir. 1968), *cert. den.* 393 U.S. 1030, 89 S.Ct. 642, 21 L.Ed.2d 574 (1968). Such a burden requires more than bare assertions. *Burston v. Caldwell,* 506 F.2d 24 (5th Cir. 1975). On this ground, petitioner has completely failed to carry her burden of proof. Petitioner testified before the undersigned Magistrate that she remembered nothing regarding the closing arguments. Indeed, she remembered ***no*** prejudicial comments made by the District Attorney (FHCT 1, Vol. 2, 55-56). Additionally, her trial counsel testified that he did not remember prejudicial remarks during the guilt-innocence phase of the trial (FHCT 1, Vol. 1, 66-67). Such a failure to bring forth

evidence to support such allegations is clearly a failure to satisfy petitioner's burden of proof.

As a final allegation to support the ineffective assistance of counsel ground, petitioner alleges that trial counsel failed to properly argue against the death penalty in the sentencing phase of trial. The basis of this allegation is that trial counsel's closing argument was relatively short. It did in fact, cover only three pages of the trial transcript (T TR 327-330). Length of closing argument alone, cannot reasonably determine the effectiveness of such argumment. Petitioner's trial counsel testified before this Court that his decision to shorten closing statement was a tactical one. He felt that the evidence was detrimental to petitioner and therefore, he chose not to repeat the evidence or refreshen the jury's mind (FHCT 1, Vol. 1, 70-71). This allegation is without merit.

A review of all the transcripts reveals that petitioner's trial counsel possessed adequate knowledge of all the facts in petitioner's case, that counsel vigorously cross-examined the State's witnesses, and that defense counsel made timely and appropriate objections. The totality of circumstances in the entire record leads the undersigned Magistrate to the conclusion that Shirley Tyler was rendered effective assistance of counsel. Consequently, this ground for relief is without merit.

II. THE REMAINING TEN GROUNDS

The petitioner contends that there was a systematic exclusion of all prospective jurors who possessed conscientious or religious scruples against the death penalty. She argues that such an exclusion of prospective jurors who

could be fair and impartial in judging the petitioner's guilt or innocence solely because of such scruples violates her rights under the Georgia Constitution and the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. As a third ground for relief, petitioner contends that the jury was improperly qualified by the premature exclusion of two venire persons who expressed doubt as to whether they could impose the death penalty violated her rights under the Sixth and Fourteenth Amendments to the United States Constitution. Since both grounds directly challenge the composition of petitioner's jury, they will be dealt with simultaneously.

In *Witherspoon v. Illinois,* 391 U.S. 510 (1968), the United States Supreme Court rejected a contention which stated that jurors not opposed to the death penalty tend to favor the prosecution in the determination of guilt. In so rejecting, the high court stated:

> We simply cannot conclude, either on the basis of the record now before us or as a matter of judicial notice, that the exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction.

Witherspoon v. Illinois, 391 U.S. at 517-518.

After a thorough review of petitioner's voir dire transcript in the instant case, (T TR 14-69), this Court concludes that those jurors excluded were properly removed under the *Witherspoon* doctrine. Also see, *Spinkellink v. Wainwright,* 578 F.2d 582 (5th Cir. 1978). Consequently, this ground is without merit.

Next, petitioner makes the broad allegation that her Sixth and Fourteenth Amendment rights were violated by

the premature exclusion of two venire persons who expressed doubt as to whether they could impose the death penalty at all. The record reveals that one prospective juror was questioned as to his ability to vote for the death penalty if the evidence so warranted (T TR 8). In response, the prospective juror revealed that he was so opposed to the death penalty that no matter what the evidence showed he would not be able to vote for the penalty. That juror was disqualified. A second prospective juror expressed disapproval of the death penalty, however, when questioned further stated that she could vote for the death penalty if the evidence so warranted (T TR 13). That juror was not disqualified. No other prospective jurors expressed objection to the death penalty. Petitioner's trial jury was not improperly qualified under *Witherspoon v. Illinois,* 391 U.S. 510 (1968).

In the recent decision of *McCorquodale v. Balkcom,* No. 82-8011, slip op. (11th Cir. May 31, 1983) the Eleventh Circuit Court of Appeals granted habeas corpus relief where the prosecutor failed to inquire further after jurors represented personal disapproval of the death penalty. Under the law of this case, the trial court must determine that the juror understands the distinction between possessing a personal opinion concerning capital punishment, and the ability to subordinate that view in order to perform his or her duty as a juror. Slip op. at 3214.

In *McCorquodale,* the venire persons were questioned *collectively* as to whether they were conscientiously opposed to capital punishment. Those who answered that question affirmatively were asked the following two questions, in the collective: (a) whether their opinion as to capital punishment would prevent them from voting for

the death penalty in the case before the Court; and (b) would their opinions as to capital punishment prevent them from being fair and impartial on the issue of guilt or innocence. Fifteen jurors were subsequently excused for cause, based on their answers to this series of collectively posed questions. The Eleventh Circuit held that the jurors were prematurely excused because it had not been clearly established that the jurors would automatically vote against the death penalty, despite what the evidence showed.

In the instant case, the Magistrate concludes that there is no *McCorquodale*-type error. The only questions asked collectively were: (1) whether anyone possessed a legal or moral objection to sitting on a jury in a murder case; and (2) whether any of the prospective jurors were opposed to the death penalty. (T TR 10-13). One venire man answered the first question affirmatively, and was questioned further regarding his inability to separate his personal feelings from his ability to be fair. He was ultimately dismissed based on his answers to four additional specifically directed questions by counsel. A venire woman who answered, "I don't think so", when asked if she possessed any legal or moral reason why she could not sit on a jury of one charged with murder, was similarly questioned further as to her ability to sit on petitioner's jury. That venire woman expressed no objection as all. She was retained on the jury panel.

In the light of the specific questions posed to each venire person who expressed any personal doubt or reservation, and in light of their answers, the Magistrate concludes that *McCorquodale v. Balkcom,* No. 82-8011, slip op.

(11th Cir. 53183), is not applicable to the instant case. Consequently, petitioner's third ground is without merit.

As a fourth ground for relief, petitioner contends that her rights were violated by the admission into evidence at her trial of statements made involuntarily by her to officers of the Georgia Bureau of Investigation while in the custody of said officers. Petitioner contends that the statements were involuntarily extracted from her by promises and threats at a time when she was incapable of either maintaining her right to silence or making a voluntary waiver of her rights. This precise issue was raised in petitioner's direct appeal to the Georgia Supreme Court. 247 Ga. 119, 274 S.E.2d 549 (1981). The Georgia court found that petitioner freely and voluntarily confessed. *Tyler v. State,* 274 S.E.2d at 553.

This Court is in agreement with the finding of the Georgia Supreme Court on this issue. The record, as a whole, indicates that petitioner made the incriminating statements voluntarily and of her own free will, and without the inducement of a promise of a benefit or a hope of reward. At trial, a *Jackson v. Denno* hearing was held outside the presence of the jury for the purpose of determining the voluntariness of petitioner's statements (T TR 181-200). The test for voluntariness is whether, under the totality of the circumstances, the statement is the product of the accused's free and rational or unconstrained choice. *Greenwall v. Wisconsin,* 390 U.S. 519, 521 (1968); *Schneckloth v. Bustamonte,* 412 U.S. 218, 225 (1973). It is further clear that voluntariness of a confession need only be established by a preponderence of the evidence. *Lego v. Twomey,* 404 U.S. 477, 489 (1972). In the instant case, the record

clearly supports a finding that the statement in question was voluntarily given. Consequently, this ground is without merit.

As a fifth ground for relief, petitioner contends that the prosecutor made improper comments during the guilt-innocence phase and the sentencing phase of petitioner's trial. To support this ground, petitioner offers only the broad assertion that the prosecutor "drew the jury's attention to petitioner's exercise of [her] fundamental, constitutional rights and penalized petitioner for her exercise of those rights." Petitioner has completely neglected to bring forth precise comments allegedly made by the prosecutor which support the ground she now asserts. Clearly, a petitioner in a habeas corpus proceeding has the burden of proof to establish sufficient facts to warrant a finding of denial of constitutional rights. *Tyler v. Beto*, 391 F.2d 993 (5th Cir. 1968), *cert. den.*, 393 U.S. 1030, 89 S.Ct. 642, 21 L.Ed.2d 574 (1968); *Burston v. Caldwell*, 506 F.2d 24 (5th Cir. 1975). Petitioner has failed to meet the burden on this ground. Therefore, this Court does not reach the question of whether the alleged statement was so egregious as to render petitioner's trial fundamentally unfair. *Skipper v. Wainwright*, 598 F.2d 425 (5th Cir. 1979). This ground is without merit.

The transcript of petitioner's trial does not include the opening and closing statements of counsel. Petitioner urges, as her sixth ground for relief, that the failure to record counsel's arguments are constitutional violations which require vacation of the death sentence. This contention is without merit. *See Stephens v. Zant*, 631 F.2d 397 (5th Cir. 1980). While petitioner has alleged that the prosecutor made improper arguments, she has made no

specific allegation that would lead this Court to believe that anything erroneous, inflammatory or prejudicial occurred in the untranscribed portion of the trial. There is sufficient, affirmative, transcribed evidence in this case on which to base the conviction and sentence. As an additional matter, both petitioner and one of her trial attorneys were present at the first habeas corpus evidentiary hearing before the undersigned Magistrate. Neither suggested any prosecutorial statement which was harmful, erroneous, inflammatory, or prejudicial. *See Clayton v. Blackburn,* 578 F.2d 117 (5th Cir. 1978).

In petitioner's seventh ground for relief, she alleges that the death penalty constitutes cruel and unusual punishment under the facts of this case. As her eighth ground for relief, petitioner alleges that the death sentence violates due process because of the trial court's failure to apprise the jury of petitioner's lack of any prior criminal record. As her tenth ground for relief, petitioner contends that the trial court erred in its jury instruction relating to aggravating and mitigating circumstances. Since these grounds all relate to the propriety of the death sentence, they will be dealt with simultaneously.

Ga. Code Ann. § 27-2734.1, O.C.G.A., § 17-10-30 provides that the judge shall include in his instructions any mitigating or aggravating circumstances supported by the evidence, and subsection (b) (7) provides in pertinent part:

> The offense of murder . . . was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim.

In construing this provision, the Georgia Supreme Court, in *Blake v. State,* 239 Ga. 292, 236 S.E.2d 637 (1977), found no significant dissimilarity in "outrageously vile", "wantonly vile", "horrible" or "inhuman." Under Georgia law, "outrageously or wantonly vile, horrible or inhuman" clearly involves some element of torture or serious physical abuse. See, *Godfrey v. Georgia,* 446 U.S. 420, 431 (1980).

In the instant case, the trial judge adequately and sufficiently instructed the jury as to aggravating and mitigating circumstances (T TR 330-335). Additionally, the evidence in this case leads one to the reasonable conclusion that the murder victim's painful and protracted death was indeed tortuous. Under the Georgia statute and the facts of this case, the sentence of death was properly imposed. No constitutional error exists on these grounds.

The petitioner strenuously urges, as her ninth ground for relief, that her conviction was unconstitutional in that the charge given by the trial court impermissibly shifted the burden of proof onto the petitioner as to her mental condition at the time of the offense. Such an allegation, if true, violates the ruling in *Sandstrom v. Montana,* 442 U.S. 510, 99 S.Ct. 2450 (1979). Without squarely stating, the petitioner appears to claim that the judge's charge on malice as an element of the crime of murder required the petitioner, rather than the state, to prove this essential element of the crime. Petitioner seemingly urges that the charge could have been interpreted by the jury as a mandatory and conclusive presumption, thereby shifting the burden of proof onto her.

The due process clause of the Fourteenth Amendment protects an accused against conviction except upon

proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. *In re Winship,* 397 U.S. 358, 364, 90 S.Ct. 1068, 1973 (1970); *Patterson v. New York,* 432 U.S. 197, 97 S.Ct. 2319 (1977); *Mullaney v. Wilbur,* 421 U.S. 684, 95 S.Ct. 1881 (1975). For instance, a charge by the trial court that permits the jury to presume the element of intent from the proof of facts which are insufficient to establish the crime would be unconstitutional. *Sandstrom v. Montana, supra; Tennon v. Ricketts,* 642 F.2d 161, 163 (5th Cir. 1981). The decision in *Sandstrom* is designed to protect an accused from having to disprove an essential element of an offense because of a presumption against him. Whether a defendant has been afforded his due process rights depends on how a reasonable juror could have interpreted the judge's instruction. *Sandstrom v. Montana,* 442 U.S. 510, 99 S.Ct. 2450 (1979).

If a charge involves a presumption that shifts the burden of proof onto the accused, the charge must be declared unconstitutional. In determining the constitutionality of a particular charge, the Court must examine it as a whole. *Cupp v. Naughten,* 414 U.S. 141, 146-147, 94 S.Ct. 396, 400 (1973); *United States v. Brooks,* 611 F.2d 614 (5th Cir. 1980). The Court must answer the following question: Did the charge, as presented, relieve the State of proving every element of a criminal offense beyond a reasonable doubt by shifting the burden to the accused? A careful examination of the charge given to the jury in the instant case compels the undersigned Magistrate to conclude that the charge was proper.

The charge given by the trial judge reads, in pertinent part, as follows:

> Now, murder is defined as follows. A person commits murder when he unlawfully and with malice aforethought, either expressed or implied, causes the death of another human being. Malice is that deliberate intention unlawfully to take away the life of a fellow creature. Malice is a state of mind, and must be proved indirectly. It is an element of the crime of murder with malice aforethought, and therefore must be proven by the State beyond a reasonable doubt.

(T TR 305).

Petitioner also charges that the trial court similarly erred in its charge on intent. The transcript reflects the following instruction regarding intent:

> Now, a crime is a violation of a statute of this State, in which there shall be a union, or a joint operation of an act and intention, or an act of criminal negligence.
>
> * * *
>
> Intent is a material element as to this offense, and the burden is upon the State to prove intent beyond a reasonable doubt.

(T TR 299, 300-301).

Petitioner contends that the trial court instructions failed to specify the quantum of proof or lack of intent which petitioner had to demonstrate in order to overcome a finding by the jury that she had caused the death of the victim, and the rebuttable presumption flowing therefrom. She contends the jurors were not given a limiting definition of the "requisite quantum." From a review of the trial court's instructions as a whole, the undesigned Magistrate is satisfied that there was no shifting of the burden. The state continually bore the burden of proof on each of the elements of murder beyond a reasonable doubt. This ground is without merit.

As a final ground for relief, petitioner contends that the trial court erred in denying her motion for psychiatric examination and that such denial unconstitutionally prevented her from presenting evidence of her mental instability and emotional state prior to the murder, and at a later time prior to her sentencing. Extensive examination and cross-examination of petitioner on this issue was conducted in the state habeas corpus hearing in the Superior Court of Baldwin County, Georgia. (See State Habeas Corpus Transcript). Petitioner testified that she had been taking medication for nerves and generally suffered from low blood pressure and nervousness. It should be noted, that as a matter of Georgia law, the granting or denial of a motion such as this lies within the sound discretion of the trial court. *Cobb v. State,* 244 Ga. 344, 260 S.E.2d 60 (1979), *Crenshaw v. State,* 244 Ga. 430, 260 S.E.2d 344 (1979). Other than petitioner's sketchy testimony as to her opinion that she may have needed psychiatric evaluation, there is no evidence in the record before this Court which supports petitioner's assertion that a psychiatric examination would have revealed any favorable mitigating evidence. Any assumption by this Court, in light of the void in the record, would be mere speculation. This ground is without merit.

RECOMMENDATION

Accordingly, for the foregoing reasons, the Magistrate recommends that this petition for writ of habeas corpus be denied and the case dismissed.

SO REPORTED AND RECOMMENDED this 8th day of June, 1983.

/s/ John E. Dougherty
UNITED STATES MAGISTRATE

EDITOR'S NOTE

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OCTOBER TERM, 1985

NO. 85-314

FLOYD JAMES, WARDEN . . . . . Petitioner

V.

SHIRLEY TYLER . . . . . Respondent

RESPONDENT"S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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IN THE SUPREME COURT OF THE UNITED STATES

NO. OCTOBER TERM, 1985

85-314

FLOYD JAMES, WARDEN PETITIONER

V.

SHIRLEY TYLER RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion below from the United States Court of Appeals for the Eleventh Circuit is reported in Tyler v. Kemp, 755 F. 2d 741 (11 Cir. 1985).

JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 USC Sect. 1257 (3).

QUESTION PRESENTED

1. Is There A Substantial Federal Question Presented For Review By This Court As A Result Of A Finding Of Ineffective Assistance of Counsel.

STATEMENT OF THE CASE

The Court in Tyler v. Kemp, 755 F 2d 741 (11th Cir. 1985), sets out the relevant facts in deciding that defense counsel was ineffective at the time of sentencing. The State's petition claims that "most of the evidence identified by the circuit court as being 'mitigating' was presented by the jury through the testimony of the Respondent and her son on the guilt/innocence phase of the trial, including the lack of any

prior criminal record" (Petition For Certiorari, p-15)[1] No reference is made to the trial transcript to support this claim, and counsel for respondent can find nothing in the testimony of Tyler or her son to support this claim.

Argument

2. No Substantial Federal Question Is Presented For Review By This Court By The Holding That Counsel Was Ineffective At Sentencing.

Petitioner bases his petition on the grounds that the Eleventh Circuit misapplied the standards set out in Strickland v. Washington, _____ U.S. _____, 104 S. Ct. 2052 (1984). Defense counsel, Richard Bishoff, graduated from law school in March of 1979 and was admitted to the bar in June, 1979. He was appointed to represent respondent in November of 1979, and his sum total of criminal court experience was one day and a half in August of 1979, and it appears he never tried a criminal jury trial prior to being appointed. Shirley Tyler has no prior record, had worked and supported the family for several years, her husband had a violent character and abused her. She was a good mother to her three children, and several relatives were willing to testify as a character witnesses if they had been called. In Lockett v. Ohio,438 US 586, this Court held that a defendant has the right to

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1 It would appear that if there was mitigating evidence presented in the guilt/innocence phase the Eleventh Circuit would have set aside the death penalty on the grounds that the jury charge regarding mitigating circumstances was constitutionally inadequate. Tyler v. Kemp, 755 F.2d at page 746, 747. See also Spivey v. Zant, 661 F.2d 464 (5th Circuit Unit B 1981); Morgan v. Zant, 743 F.2d 775 (11th Cir. 1984); Finney v. Zant, 709 F.2d 643,647 (11th Cir. 1983); Westbrook v. Zant, 704 F. 2d 1487 (11th Cir. 1983).

The Court below concluded that the charge was defective, but held it did not effect the outcome of the trial since no mitigating evidence was presented.

introduce virtually any evidence in mitigation at the penalty phase.

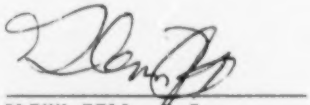
In Strickland v. Washington, supra, this court set out a two-part test in order to determine if counsel was ineffective. First, did counsel in fact render a deficient performance. It is frankly difficult to imagine a more unsatisfactory and incompetent performance by Bishoff in failing to present any evidence at the sentencing phase. This cannot be considered a strategic decision since calling her employer as a character witness and stipulating that she had no criminal record could only benefit Mrs. Tyler. The second part is whether counsel's performance was so deficient that it was prejudiced to the defense. Clearly this investigating evidence would probably have resulted in a life sentence for respondent. See also King v. Strickland, 748 F 2d 1462 (11th Cir. 1984). The primary responsibility for insuring that these mitigation consideration are presented to the sentencing authority falls squarely upon the defense counsel. A substantial failure to obtain and present such information plainly constitutes ineffective assistance of counsel. See Mason v. Balkom, 531 F. 2d 717, 724 (5th Cir. 1976); United States v. Pinkney, 531 F. 2d 1241, 1248 (D.C. Cir. 1976).

Conclusion

Respondent submits that the decision of the United States Court of Appeals affirming the United States District Court was based on a proper application of the holding in Strickland v. Washington, supra.

As the Eleventh Circuit has pointed out "No court should appoint an inexperienced lawyer to represent the defendant in a death penalty case. The risks to defendant, counsel, the judicial system and the community at large are too great...." Tyler v. Kemp, supra, at page 746.

For the reasons stated above, it is respectfully contended by respondent that the Petition for Writ of Certiorari should be denied.



GLENN ZELL, P.C.
COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I, Glenn Zell, do hereby certify that I have served a copy of the foregoing document to the person listed below by depositing said copy in the United States mail in a properly addressed envelope with adequate postage thereon to:

William B. Hill, Jr.
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334

This 11 day of November, 1985.

GLENN ZELL, P.C.